Supreme Court, U.S.
FILED
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No. 06-652

In The
Supreme Court of the United States

BART DIDDEN, DOMENICK BOLOGNA, CABERNET 119 REALTY CORP., OPUS 113 CORP., PAUILLAC 115 REALTY CORP., AND 117 NORTH MAIN STREET CORP.,

Petitioners,

v.

THE VILLAGE OF PORT CHESTER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTIONS PRESENTED

In *Kelo v. City of New London*, this Court held that economic development within an integrated development plan was a "public use" under the meaning of the Fifth Amendment to the U.S. Constitution. Does *Kelo* therefore completely preclude *all* claims of private purpose takings within an integrated development plan area, including a claim that eminent domain was used for financial extortion and the purely private financial goals of a single party?

What limits if any do the Fifth and Fourteenth Amendments to the U.S. Constitution place on demands for cash in exchange for refraining from the use of eminent domain?

PARTIES TO THE PROCEEDINGS

Petitioners, who were plaintiffs below, are Bart Didden, Domenick Bologna, Cabernet 119 Realty Corp., Opus 113 Corp., Pauillac 115 Realty Corp. and 117 North Main Street Corp.

Respondents, who were defendants below, are the Village of Port Chester, New York; the Board of Trustees for the Village of Port Chester; Gerald Logan, individually and in his official capacity as Mayor of the Village of Port Chester; Peter J. Ciccone, individually and in his official capacity as Village Trustee for the Village of Port Chester; Daniel Colangelo Jr., individually and in his official capacity as Village Trustee for the Village of Port Chester; John M. Crane, individually and in his official capacity as Village Trustee for the Village of Port Chester; Gerard DiRoberto, individually and in his official capacity as Village Trustee for the Village of Port Chester; Anthony Napoli, individually and in his official capacity as Village Trustee for the Village of Port Chester; Robert Sorensen, individually and in his official capacity as Village Trustee for the Village of Port Chester; G&S Port Chester, LLC.; and Gregory Wasser.

RULE 29.6 DISCLOSURE STATEMENT

Petitioners make the following corporate disclosure statement pursuant to Supreme Court Rule 29.6:

Cabernet 119 Realty Corp., Opus 113 Corp., Pauillac 115 Realty Corp. and 117 North Main Street Corp. are non-governmental corporate parties. None of them has a parent corporation, and no publicly held company has a 10 percent or greater ownership interest in any of these entities.

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The decision of the U.S. Court of Appeals for the Second Circuit of which review is sought was unreported but is available at 173 Fed. Appx. 931, 2006 U.S. App. LEXIS 8653, 2006 WL 898093 (2d Cir. Apr. 5, 2006) and is reproduced in the Appendix at App. 1. The decision of the District Court for the Southern District of New York is reported at 322 F. Supp. 2d 385 (S.D.N.Y. 2004) and reproduced in the Appendix at App. 5.

JURISDICTION

The decision and judgment of the U.S. Court of Appeals for the Second Circuit was entered on April 5, 2006. Petitioners moved for reconsideration en banc, which was denied on August 9, 2006. App. 60. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the public use provision of the Takings Clause of the Fifth Amendment to the United States Constitution and also the due process and equal protection requirements of the Fourteenth Amendment to the U.S. Constitution. App. 62. Jurisdiction was invoked in federal court under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343.

STATEMENT

The Petitioners in this case have alleged that a private developer approached them and demanded a direct cash payment of $800,000 or a 50% equity interest in Petitioners' business in exchange for not having their property taken by eminent domain.[1] Am. Compl. ¶ 48, March 3, 2004. Petitioners refused, and condemnation papers were filed the following day. *Id.* at ¶ 50. Petitioners further alleged that the condemning body, the Village of Port Chester, knew about and approved of these actions by the private developer and that the condemnation was solely for the purpose of furthering the private financial goals of the developer. *Id.* at ¶ 60. The Petitioners' property was located within a preexisting redevelopment district. *Id.* at ¶ 30.

Petitioners brought this action under 42 U.S.C. § 1983, alleging that the condemnation of their property was for the purpose of satisfying the financial goals of a single private party and not for a public purpose. *Id.* at ¶ 79. They also alleged that the attempted extortion and subsequent condemnation violated their rights to due process and equal protection. *Id.* at ¶ 75, 82, 85. The Southern District of New York granted FRCP 12(b)(6) motions to dismiss the complaint. *Didden v. Village of Port Chester*, 322 F. Supp. 2d 385, 391 (S.D.N.Y. 2004); App. 14. The Second Circuit affirmed, relying on this Court's decision in *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005), to hold that a claim of a taking for "private

[1] All facts are taken from the Amended Complaint. The allegations of the Amended Complaint must be accepted as true on an appeal from a dismissal under FRCP 12(b)(6). *See, e.g., Sutton v. United Airlines*, 527 U.S. 471, 475 (1999).

use within a redevelopment district" did not state a cause of action on which relief could be granted. *Didden v. Village of Port Chester*, 173 Fed. Appx. 931, 933 (2d Cir. April 5, 2006); App. 4.

The Village of Port Chester's redevelopment plans began more than 20 years ago. It originally created the Marina Redevelopment Urban Renewal Plan in 1982. Am. Compl. ¶ 26. It modified the plan in 1991 and selected a developer to implement the plan. *Id.* In 1997, the Village selected a different private developer, Respondent G&S Port Chester, LLC. *Id.* at ¶ 27. Then, on or about July 14, 1999, the Village approved a further modification and enlargement of the Marina plan, now called the Modified Marina Redevelopment Urban Renewal District ("Redevelopment District"). *Id.* at ¶ 29. The 1999 Redevelopment District included some of Petitioners' property and designated that area for future retail development.[2] *Id.* The Village's approval included a finding of "public purpose" for the future use of eminent domain within the Redevelopment District. *Id.* at ¶ 31. *See* N.Y. Em. Dom. Proc. Law § 204. Petitioners did not challenge the 1999 Redevelopment District or the finding of "public purpose" made in 1999. Am. Compl. ¶ 31.

In 2003, nearly four years after the Redevelopment District was approved, representatives of CVS Pharmacy approached Petitioners about the possibility of constructing a CVS Pharmacy on their property within the redevelopment area and on contiguous properties, also owned by Petitioners, that lay outside the redevelopment area. *Id.* at

[2] Petitioners owned or controlled an assemblage of contiguous property that straddled the Redevelopment District, with some property inside the district and some outside. *Id.* at ¶ 32.

¶¶ 32-33. The planned CVS Project would have redeveloped a total of .76 acres of land on which all existing structures would be razed and replaced with a new 12,150 square foot building offering a drive-thru prescription window and on-site parking spaces. *Id.* at ¶ 35.

Petitioner applied for the necessary approvals from the Village of Port Chester Planning Commission. On November 26, 2003, the Planning Commission gave preliminary site plan approval for the project and determined that no further environmental review was necessary. *Id.* at ¶ 44. Petitioners then entered into a lease agreement for the CVS Project with CVS Port Chester, LLC, a wholly-owned subsidiary of CVS Corporation. *Id.* at ¶ 47. The initial term of the CVS lease was 25 years, and potential renewals of the lease could extend the total term to more than 48 years. *Id.*

After Petitioners began the process of obtaining the necessary approvals for the CVS project, representatives of the Village of Port Chester directed Petitioners to meet with Respondent Gregg Wasser, one of the principals of Respondent G&S Port Chester, the Village's chosen developer for the Redevelopment District. *Id.* at ¶ 48. On November 5, 2003, Petitioners met with Wasser and his lawyer to discuss Petitioners' proposed CVS Project. *Id.* During this meeting, Wasser demanded that Petitioners pay him the sum of $800,000 or make him a 50% partner in the CVS Project. *Id.* If Petitioners refused, Wasser stated that he would cause the Village to commence a condemnation proceeding and take Petitioners' properties within the Redevelopment District. *Id.* Wasser calculated the $800,000 demand solely based upon his estimate that development of the property as a retail pharmacy use would yield approximately $2,000,000 in profit. *Id.* at ¶ 49.

Petitioners refused to pay Wasser the $800,000 or to make him a partner in the project. *Id.* at ¶ 48.

Petitioners refused Wasser's demands on November 5, 2003. *Id.* The very next day, November 6, 2003, the Village of Port Chester filed a condemnation petition to acquire Petitioners' property so that it could be transferred by lease to G&S Port Chester in order to construct a Walgreens. *Id.* at ¶¶ 50, 62. Over the next several months, Petitioners repeatedly told the Village Board about the $800,000 demand and requested that it suspend the condemnation, but the Village declined to do so, instead again directing Petitioners to negotiate with Wasser. *Id.* at ¶¶ 51, 54, 56. The Village approved of Wasser's actions and allowed Wasser to decide that Petitioners' property would be taken by eminent domain. *Id.* at ¶ 60.[3]

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[3] The relevant portions of the Amended Complaint read as follows:

> 48. On or about November 5, 2003, pursuant to the direction of Defendant Village of Port Chester, Plaintiffs met with Defendant Wasser and his counsel to discuss the CVS Project. During this meeting, Defendant Wasser demanded that Plaintiffs pay him the sum of $800,000.00, or else he would cause Defendant the Village to commence a condemnation proceeding against the Subject Properties and thereby divest Plaintiffs of title. In addition to demanding that Plaintiffs pay him $800,000.00 in order to avert a condemnation proceeding, Defendant Wasser also offered to allow Plaintiffs to proceed with their CVS Pharmacy project if they (the Private Defendants) were given a partnership interest in the redevelopment. Plaintiffs refused to accept either of these demands.
>
> 49. The Private Defendants calculated their $800,000.00 demand solely based upon Defendant Wasser's estimate of the profit to be realized by whoever developed the Subject Properties. In particular, Defendant Wasser estimated that redevelopment of the Subject Properties as a retail pharmacy use would yield approximately $2,000,000.00 in profit

(Continued on following page)

Petitioners then brought this action against the Village, the Village Board of Trustees, G&S Port Chester, and Wasser, alleging that their actions violated the public use, due process, and equal protection requirements of the U.S. Constitution. *See* U.S. Const. amends. V, XIV; App. 62. The action, filed on January 16, 2004, was brought under 42 U.S.C. § 1983. Petitioners claimed that the condemnation of their property was for private financial gain and not for a public purpose, that the $800,000 demand was an unconstitutional exaction, and that the demand and

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for the developer(s) who successfully completed such a project.

56. At the conclusion of the Village Board meeting, Plaintiffs' counsel asked Special Counsel Tulis to adjourn the Petition in the Condemnation Proceeding while the parties discussed the matter per Mayor Logan's "announcement." Special Counsel Tulis responded that the Condemnation Proceeding would not be adjourned unless Defendant G&S Port Chester (who is not a party to the Condemnation Proceeding) consented to such adjournment. Special Counsel Tulis reiterated that Defendant Village Board wished Plaintiffs to deal directly with Defendant G&S through him.

60. The Private Defendants have engaged in an unlawful course of conduct with the actual knowledge and approval of the Public Defendants. The Public Defendants have completely abdicated their responsibilities, as public servants and state actors within the meaning of 42 U.S.C. § 1983, to implement their statutory power of eminent domain solely to promote public uses and good works. Instead, the Public Defendants have knowingly allowed the Private Defendants to wield and implement the eminent domain power to further their own purely private financial goals. Incredibly, with full knowledge of the Private Defendants' outrageous, lawless conduct with respect to Plaintiffs' CVS Pharmacy project, the Public Defendants have allowed the Private Defendants to control the course of the Condemnation Proceeding.

subsequent condemnation violated their rights to due process and equal protection.

Respondents moved to dismiss the action, and Plaintiffs served an Amended Complaint as a matter of right.[4] In a published opinion dated May 25, 2004, the District Court granted the motions and dismissed the Amended Complaint. The District Court held that because the developer could cause the Village to condemn the property under the redevelopment plan, Wasser's threat to do what he was entitled to do by law did not violate the Constitution. 322 F. Supp. 2d at 390; App. 6. Because neither the $800,000 demand nor any aspect of the condemnation itself was actionable, Petitioners could only challenge the condemnation by challenging the entire redevelopment plan – but any challenge to the 1999 plan was barred by the statute of limitations. *Id.* at 388, 390; App. 10, 12.

Petitioners appealed to the U.S. Court of Appeals for the Second Circuit, which affirmed, on the grounds that Petitioners' claims were time-barred and that they had failed to state a cause of action. Although they are portrayed as two distinct holdings, both rest on the identical legal conclusion: a challenge to the purpose of a particular condemnation within a redevelopment area is not constitutionally cognizable. According to the Second Circuit, this Court's decision in *Kelo v. City of New London* foreclosed any challenge to condemnation for "private use within a redevelopment district." 173 Fed. Appx. at 933; App. 4.

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[4] Petitioners initially sought a preliminary injunction, which was denied. *See Didden v. Village of Port Chester*, 304 F. Supp. 2d 548 (S.D.N.Y. 2004); App. 16. Petitioners appealed the denial of the injunction, but voluntarily dismissed the appeal as moot after the state court ordered the transfer of title to Respondents.

Petitioners claimed that the $800,000 demand and subsequent events showed that the condemnation of their property in 2003 was for a purely private purpose. However, the Second Circuit held that the only legally cognizable challenge to the condemnation would be a challenge to the public purpose of the 1999 Redevelopment District. That challenge was time-barred by the three-year statute of limitations. Because Petitioners alleged that the condemnation of their specific property had a purely private purpose and did not challenge the public purpose of the Redevelopment District itself, they had not stated a cause of action. *Id.*; App. 3. Finally, the court found that the $800,000 demand did not constitute an unlawful exaction or equal protection violation. *Id.*; App. 4.

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES A SUBSTANTIAL FEDERAL QUESTION ON AN ISSUE OF NATIONAL IMPORTANCE CONCERNING WHETHER THIS COURT'S DECISION IN *KELO V. CITY OF NEW LONDON* CREATES CONSTITUTIONAL IMMUNITY WITHIN REDEVELOPMENT AREAS AND FORECLOSES ALL CHALLENGES TO PRIVATE PURPOSE TAKINGS WITHIN REDEVELOPMENT AREAS.

The Second Circuit interpreted this Court's holding in *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005), to mean that any use of eminent domain within a redevelopment district is constitutional, *as a matter of law*. This interpretation is both incorrect and dangerous. *Kelo* should not be read to cut off all judicial review of

condemnations within redevelopment areas, regardless of the facts surrounding those condemnations.

The salient facts in this case are few:

- The Village of Port Chester authorized a Redevelopment District in 1999.
- In 2003, the private developer told Petitioners that he would have their property condemned unless they either paid him $800,000 or gave him a 50% equity interest in their project. The developer sought a share in Petitioners' expected profits.
- The Village of Port Chester condemned Petitioners' properties the day after they refused to comply with the developer's demands. The Village knew about and approved the developer's actions.

The legal question is a simple one: In charging that the purpose of the condemnation of their property was promoting the "purely private financial goals" of the developer, did Petitioners state a cause of action cognizable by the courts?

The Second Circuit, relying on *Kelo*, held that because the condemnation took place within a designated redevelopment area, Petitioners did not state a cause of action. In the Second Circuit's view, once a municipality has gone through its planning process and created a designated redevelopment area where eminent domain is authorized to implement a redevelopment plan, that area becomes, in effect, a constitution-free zone; any use of eminent domain will be deemed constitutional under *Kelo*. Thus, the court explained that "to the extent that [Petitioners] assert that the Takings Clause prevents the State from condemning their property for a private use within a redevelopment district . . . the recent Supreme Court decision in *Kelo v.*

City of New London, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), obliges us to conclude that they have articulated no basis on which relief can be granted." 173 Fed. Appx. at 933; App. 3-4.

The issue in this case is one of broad impact because takings that result in private ownership normally do occur within redevelopment areas. These areas usually encompass multiple properties, and redevelopment designations routinely remain in place for decades. If the Second Circuit's interpretation is allowed to stand, it will effectively insulate condemnations in redevelopment areas from judicial review. Because this case comes to the Court on a motion to dismiss, it provides an unusually clear legal setting for the Court to address this issue. The Court need only decide if an allegation of condemnation for purely private financial gain states a cause of action when the property sits within an "integrated development plan" area. *Kelo*, 125 S. Ct. at 2655.

A. *Kelo* creates confusion on whether redevelopment areas create constitutional immunity to all private purpose takings claims.

The Second Circuit's ruling reflects an issue left open by the Court in *Kelo*. *Kelo* acknowledges that the Constitution still forbids private purpose takings but gives little explanation as to what those might look like. "[T]he City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." 125 S. Ct. at 2661; *see also id.* at 2669 ("Transfers intended to confer benefits on particular, favored private entities, and

with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.") (Kennedy, J., concurring).

The apparent source of the Second Circuit's confusion is that the *Kelo* majority seems to assume that abusive condemnations will take place only "outside the confines of an integrated development plan." The Court explains that the *Kelo* facts did not present "a one-to-one transfer of property, executed outside the confines of an integrated development plan." It then comments that "such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot" and that "[c]ourts have viewed such aberrations with a skeptical eye." 125 S. Ct. at 2667 and n.17.[5]

Kelo's further explanation that "we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project" strengthens the impression that courts should not examine the events surrounding particular takings within a redevelopment plan area to determine if they are unconstitutional. *See* 125 S. Ct. at 2668. And indeed, the Second Circuit explicitly relies on that passage to conclude that it should not examine whether the particular taking of

[5] To complicate matters further, the Court cites *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *appeal dismissed as moot*, 60 Fed. Appx. 123 (9th Cir. Mar. 7, 2003) as an example of an improper private taking because it constituted a one-to-one transfer of property "outside the confines of an integrated development plan." *Kelo*, 125 S. Ct. at 2667 n.17. However, *99 Cents* is actually an example of a private use taking *within* a redevelopment area. *See 99 Cents*, 237 F. Supp. 2d at 1125 ("In 1983 . . . Lancaster enacted an ordinance establishing the Amargosa Redevelopment Project Area and adopted a Redevelopment Plan. . . .").

Petitioners' property was for an impermissible private purpose. *See* 173 Fed. Appx. at 933; App. 4.

Justice Kennedy's concurrence, however, explains that courts must look at the record to determine if the condemnation has a private purpose. "A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose." *Id.* at 2669. Both the majority and the concurrence state that takings on the mere "pretext" of a public purpose would violate the Constitution. *Id.* at 2661 (majority opinion); 2669 (Kennedy, J., concurring). In doing so, they allude to a well-established line of pre-*Kelo* cases that do exactly what Justice Kennedy suggests: they examine the facts of particular condemnations to determine if the stated public purpose is genuine or a mere pretext for a private purpose. Such pretextual condemnations can and often do occur within a larger and generally valid development scheme.[6] Yet, in the Second Circuit's view, *Kelo* has apparently

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[6] *See, e.g.*, *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1210-11, 1229 (C.D. Cal. 2002); *99 Cents Only Stores*, 237 F. Supp. 2d at 1125 (C.D. Cal. 2001); *Casino Reinv. Dev. Auth. v. Banin*, 727 A.2d 102, 111 (N.J. Super. 1998) (hotel development plan generally valid but particular contract with private developer gave impermissible "blank check" to developer); *In re Condemnation of 110 Wash. St.*, 767 A.2d 1154, 1156 (Pa. Commw. Ct. 2001); *Redev. Auth. v. Owners*, 274 A.2d 244, 252 (Pa. Commw. Ct. 1971) (property within urban renewal area taken to provide substitute property to another party whose other property was being condemned for a public project); *City of Dayton v. Keys*, 252 N.E.2d 655, 660-61 (Ohio Ct. Comm. Pleas 1969) (property within urban renewal plan area condemned in order to satisfy contractual obligation to single developer).

turned redevelopment areas into constitution-free zones – any taking, however pretextual the public purpose, will pass muster as long as it occurs within a redevelopment area.

Nearly all condemnations for transfer to private parties occur pursuant to development plans or within designated redevelopment areas.[7] In the Second Circuit's view, once a redevelopment designation has been established, however, there can be no judicial review of takings within the area, for as long as the redevelopment designation lasts. Redevelopment designations usually last for decades. *See, e.g., Redev. Agency v. Rados Bros.*, 115 Cal. Rptr. 2d 234, 237 (Cal. Ct. App. 2001) (redevelopment project originally adopted in 1974); *Aposporos v. Urban Redev. Comm'n*, 790 A.2d 1167, 1174 (Conn. 2002) (redevelopment plan originally adopted in 1963); *Mounts v. Evansville Redev. Comm'n*, 831 N.E.2d 784, 789 (Ind. Ct. App. 2005) (redevelopment plan originally adopted in 1984). The particular iteration of the redevelopment plan in this case spans ten years, although there has been a redevelopment area designation for more than 20 years.

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[7] State reporters are replete with cases involving private-to-private transfers within the context of a larger plan. *See, e.g., Birmingham v. Tutwiler Drug Co.*, 475 So. 2d 458, 460-61 (Ala. 1985); *Mar. Ventures, LLC v. City of Norwalk*, 894 A.2d 946, 952-53 (Conn. 2006); *State ex. rel. United States Steel v. Koehr*, 811 S.W.2d 385, 387 (Mo. 1991); *City of Las Vegas Downtown Redev. Agency*, 76 P.3d 1, 6-7 (Nev. 2003). Most states authorize municipalities to condemn property within the context of redevelopment plans or designated redevelopment zones. *See, e.g.*, Ark. Code Ann. § 14-168-304(7)(a); 20 Ill. Comp. Stat. 620(9)(b); Va. Code Ann. § 36-27(A). *See also* Wendell E. Pritchett, *Beyond Kelo: Thinking about Urban Development in the 21st Century*, 22 Ga. St. L. Rev. 895, 912-14 (2006) (describing the use of development plans to transfer property to private developers). Redevelopment area plans authorize the use of eminent domain against multiple properties.

Am. Compl. at ¶ 26. In many states, redevelopment area designations *never* expire. *See, e.g.*, 315 Ill. Comp. Stat. 5/13; Nev. Rev. Stat. §§ 279.572, 589; N.J. Stat. §§ 40A:12A-4, -5, -14; W. Va. Code § 16-18-5. If the Second Circuit is correct that *Kelo* precludes, as a matter of law, any and all private use takings claims within the borders of a redevelopment area, then developers and local governments will have a free pass, as in this case, to use their power for private gain with impunity. This Court should not condone such a result.

B. This case presents an unusually clear setting to consider whether *Kelo* forecloses all private use challenges within a redevelopment plan area.

Petitioners recognize that the *Kelo* decision is little more than a year old and that this Court might be inclined to wait before clarifying the decision. Nonetheless, Petitioners ask this Court to consider their challenge now.[8] It presents the issue in the starkest possible terms. The validity of the Redevelopment District itself has not been challenged, so it must be accepted as valid for purposes of this action. Petitioners have alleged that a private developer demanded a cash payment or business equity in exchange for not taking their property that lay within the

[8] Although the Court sometimes lets issues percolate after a decision, it also sometimes grants certiorari to clarify doctrinal points it has recently addressed. *See, e.g., Meredith v. Jefferson County Bd. of Educ.*, 126 S. Ct. 2351 (June 5, 2006) (granting writ of certiorari) and *Grutter v. Bollinger*, 539 U.S. 306 (2003); *United States v. Booker*, 543 U.S. 220 (2005) and *Blakely v. Washington*, 542 U.S. 296 (2004); *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

"integrated development plan" area. The developer based his demand solely on his estimate of Petitioners' likely profits and his desire to share in those profits. The local government fully approved and supported this threat and condemned Petitioners' property when they did not accede to the developer's demands. The condemnation served only to further the private financial goals of the developer. Because the case was dismissed under FRCP 12(b)(6), these facts must be accepted as true. There are no issues of evidentiary weight or deference to lower court decisions. There are no possible arguments about mixed motives. There are no thorny issues of whether the actions occurred under color of state law. The sole question is whether an owner alleging the use of eminent domain for attempted financial extortion and to assist the purely private financial goals of a single private party has stated a cause of action under the Constitution, even when the condemnation takes place within an "integrated development plan" area.

The fact that Petitioners' claims were rejected by the Second Circuit in a few unpublished sentences suggests the extent to which courts believe *Kelo* has utterly precluded public use challenges, even under shocking circumstances. Previous public use challenges in this Court, including *Kelo*, all included a factual record. *See Kelo*, 125 S. Ct. at 2660; *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 234-35 (1984); *Berman v. Parker*, 348 U.S. 26, 30-31 (1954);[9] *Brown v. United States*, 263 U.S. 78, 80 (1923); *Hairston v. Danville and Western R.R. Co.*, 208 U.S. 598,

[9] While the lower court in *Berman* purportedly decided the case on a motion to dismiss, both parties moved for summary judgment, and the court expressly considered the exhibits and affidavits of both parties. *See Schneider v. Dist. of Columbia*, 117 F. Supp. 705, 708-09 (D.D.C. 1953).

605 (1908); *Clark v. Nash*, 198 U.S. 361, 367-68 (1905). Indeed, because they do depend on facts, non-frivolous as-applied constitutional challenges may be resolved on summary judgment, but they are almost never decided on motions to dismiss. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 616 (2001); *Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704-06 (1999); *E. Enters. v. Apfel*, 524 U.S. 498, 517 (1998). Even due process challenges under the rational basis test are rarely dismissed on the pleadings. *See, e.g., Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124, 126-27 (1999); *Minn. v. Clover Leaf Creamery*, 449 U.S. 456, 460-61 (1981). That the Second Circuit believes that, after *Kelo*, public use challenges fall into the tiny category of constitutional challenges that courts shouldn't even bother to hear is cause for genuine alarm.

This Court should grant Petitioners' request for certiorari to clarify *Kelo* now – before continued misunderstanding subjects more individuals to the kind of attempted extortion alleged in this case. *Kelo* may have given the green light to condemnations for economic development, but it should not be allowed to become a complete shield from judicial review for any private purpose taking within redevelopment areas.

II. THIS CASE PRESENTS AN OPPORTUNITY TO RESOLVE A SPLIT AMONG FEDERAL CIRCUITS AND STATE COURTS OF LAST RESORT ABOUT THE APPROPRIATE LEGAL STANDARD TO APPLY TO DEMANDS FOR CASH PAYMENTS IN EXCHANGE FOR GOVERNMENT DISCRETIONARY ACTION.

By asserting in a single sentence that Wasser's demand for $800,000 in exchange for not condemning

Petitioners' property was not "an unconstitutional exaction in the form of extortion," the panel below glossed over an important, and unresolved, constitutional question. 173 Fed. Appx. at 933; App. 4. The panel held that a demand for a cash payment to stave off a condemnation can never give rise to a constitutional violation. This places the Second Circuit in direct conflict with a number of state courts of last resort that have found constitutional limitations on when governments may demand cash payments as a condition of the use of their discretionary police powers over private property.[10]

A. Lower courts are split over the scope of the unconstitutional exactions doctrine.

Courts of last resort in California, Texas, Oregon, and Illinois have concluded that heightened scrutiny applies to demands for payments of cash as a condition of their exercise of discretionary authority over property. Colorado, Kansas, South Carolina, and the Ninth and Tenth Circuits, however, apply such scrutiny only to demands for the conveyance of interests in real property.

This Court's precedents establish that governments' demands for conveyances of interests in *land* as a condition of their exercise of discretionary authority over property are subject to heightened scrutiny. In *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), this Court invalidated a public easement that the California Coastal

[10] While the demand in this case was made by Respondent Wasser, the Amended Complaint alleges the action was taken under color of state law and that the Village had full knowledge of and approved of Wasser's demands. Am. Compl. ¶ 60.

Commission had demanded as a condition of granting a development permit, finding that the Commission could have required an easement that "serve[d] the same legitimate police-power purpose as a refusal to issue the permit," but could not constitutionally compel an easement that lacked an "essential nexus" with that purpose. *Id.* at 836-37. In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court invalidated another easement, holding that, even where that nexus exists, an exaction must have a "rough proportionality" to the impact of a proposed development. 512 U.S. at 391.

This Court's summary reversal of a decision upholding a cash demand also provides good reason to believe that such demands are subject to the same scrutiny as demands for land interests. Only three days after deciding *Dolan*, the Court granted certiorari and vacated a California decision upholding a city's demand for $280,000 in exchange for a rezoning decision, remanding "for further consideration in light of" *Dolan*. *See Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994). On remand, the Supreme Court of California, though divided on other issues, unanimously decided that *Dolan* scrutiny applied to the cash demand, even though the denial of the zoning permit without more would not have been a taking. *See Ehrlich v. City of Culver City*, 911 P.2d 429, 432 (Cal. 1996) (plurality opinion).[11]

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[11] *See also id.* at 459 (Mosk, J., concurring) ("a somewhat higher level of constitutional scrutiny should be applied to . . . [fees imposed] on an individual and discretionary basis" in view of *Nollan* and *Dolan's* concerns about extortion) (interior quotation marks omitted); *id.* at 462 (Kennard, J., concurring and dissenting, joined by Baxter, J.) ("I agree with the majority that *Nollan-Dolan's* . . . requirements apply to monetary exactions that . . . are imposed on a specific parcel of property

(Continued on following page)

Both *Nollan* and *Dolan* involved the exaction of real property, which has led to a great deal of confusion among lower courts when confronted with exactions that appear to be every bit as much "an out-and-out plan of extortion" as those involved in *Nollan*, 483 U.S. at 837, but seek to extort money instead of land. *See Rogers Machinery, Inc. v. Washington Cty.*, 45 P.3d 966, 976 (Ore. 2002) ("Lower court authority appears most sharply divided on the issue of *Dolan's* application to monetary exactions.").

Many courts have simply cabined *Nollan* and *Dolan* to pure physical exactions. *See, e.g., Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) ("[*Nollan* and *Dolan*] are limited to the context of development exactions where there is a physical taking or its equivalent"). These courts have declined to apply heightened scrutiny to anything but physical takings, granting governments extensive power to demand cash payments where they could not demand easements of lesser value. *See, e.g., Comm. Builders of N. Calif. v. City of Sacramento*, 941 F.2d 872, 876 (9th Cir. 1991) ("A purely financial exaction, then, will not constitute a taking if it is made for the purpose of paying a social cost that is reasonably related to the activity against which the fee is assessed."); *McCarthy v. Leawood*, 894 P.2d 836, 845 (Kan. 1995) ("There is nothing in [*Dolan*], however, which would apply the same conclusion to Leawood's conditioning certain land uses on payment of a fee.").

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as a condition of obtaining a development permit."); *id.* at 468 (Werdegar, J., concurring and dissenting) ("I also agree with the reasoning of the plurality opinion [except for a section construing the relevant California statutes]").

Other courts reject this logic. *See, e.g., Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620, 639-40 (Tex. 2004) (applying *Dolan* to requirement that developer pay for improvements to city property); *Clark v. City of Albany*, 904 P.2d 185, 190 (Ore. 1995) ("[T]he fact that *Dolan* itself involved conditions that required a dedication of property interests does not mean that it applies only to conditions of that kind."). From the standpoint of consistency, this position is eminently reasonable. A rule that provides different levels of scrutiny for a demand for an easement worth $10,000 and a simple demand for $10,000 values "form over function." *Garneau v. City of Seattle*, 147 F.3d 802, 820 (9th Cir. 1998) (O'Scannlain, J., concurring and dissenting). As such, a number of state courts of last resort have adopted the broader, more functional reading of *Nollan* and *Dolan*. *See, e.g., Northern Ill. Home Builders Ass'n v. County of DuPage*, 649 N.E.2d 384, 390 (Ill. 1995) (holding that transportation impact fee requirement was invalid on the grounds that the funds collected could be used in unrelated districts).

Some courts have based their adherence to the narrower theory on this Court's dicta in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), where it noted that it had "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use." *Id.* at 702. The Supreme Court of Colorado, for example, has argued that *Del Monte Dunes* "strongly indicate[s] that the *Nollan/Dolan* test is limited to exactions involving the dedication of property." *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 697 (Colo. 2001). *See also Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of*

North Myrtle Beach, 548 S.E.2d 595, 603 n.5 (S.C. 2001) ("[*Del Monte Dunes*] held *Dolan's* 'rough proportionality test' applied only to physical exactions"). *Del Monte Dunes*, however, does no such thing. The opinion merely indicates what the confusion of the lower courts has already shown: that this Court has never conclusively stated whether the unconstitutional exaction doctrine applies to extortionate demands for things other than real property. *See Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620, 636 (Tex. 2004) ("In neither *Dolan* nor *Del Monte Dunes* did the Supreme Court have reason to differentiate between dedicatory and non-dedicatory exactions.").

B. Lower courts' confusion stems from the muddled nature of the underlying doctrine.

The lower courts' confusion over when to apply heightened scrutiny to exactions is largely a result of uncertainty over the source, and therefore the scope, of the doctrine. Exactions implicate more than one constitutional protection. The Due Process Clause prevents governments from imposing arbitrary or irrational fees. *See Ortwein v. Schwab*, 410 U.S. 656, 660 (1973). This Court's precedents also prevent governments from imposing unconstitutional conditions on the grant of a discretionary privilege. *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 660-62 (1981). All three of these doctrines (unconstitutional conditions, due process, and unconstitutional exactions) are, to some extent, intertwined, and lower courts differ about which of them should be used to analyze governments' extortionate demands – the heightened review of *Dolan* or the rational basis review used in *Schwab*.

This deep doctrinal confusion is best illustrated by a single, splintered panel opinion from the Ninth Circuit. In *Garneau v. City of Seattle*, 147 F.3d 802 (1998), the Ninth Circuit considered a challenge to a law requiring landowners to pay mandatory relocation fees to tenants prior to redeveloping their property (separate from any payments stemming from breaking the tenants' leases). The panel issued three opinions: one holding that *Nollan* and *Dolan* applied only to physical takings, another insisting that claims about cash exactions should be analyzed under the rubric of substantive due process, and a third arguing that heightened scrutiny must apply to both demands for money payments and demands for real property because no principled distinction can be drawn between the two. *Compare id.* at 809 (Brunetti, J.) *with id.* at 815 (Williams, D.J., concurring in the result) *and id.* at 820 (O'Scannlain, J., concurring and dissenting).

C. This case presents an ideal opportunity to clarify the reach of the unconstitutional exactions doctrine.

Since *Dolan*, this Court has only had occasion to address the exactions doctrine in *dicta*, providing little clarity to lower courts. *See, e.g., Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 547 (2005) (explaining the doctrine as "a special application of the 'doctrine of unconstitutional conditions'") (quoting *Dolan*, 512 U.S. at 385) (second internal quotation marks omitted). The Court has not had the opportunity to address the extent to which demands for cash payments trigger heightened scrutiny, or even which constitutional provisions protect property owners from such demands. *Cf. Lambert v. City and County of San Francisco*, 529 U.S. 1045, 120 S. Ct. 1549, 1551 (2000)

(Scalia, J., joined by Kennedy and Thomas, JJ., dissenting from denial of certiorari) ("When there is uncontested evidence of a demand for money or other property – and still assuming that denial of a permit because of failure to meet such a demand constitutes a taking – it should be up to the permitting authority to establish *either* (1) that the demand met the requirements of *Nollan* and *Dolan* or (2) that the denial would have ensued even if the demands had been met.") (emphasis in original).

This case presents a clear-cut opportunity for this Court to clarify the borders of the competing and complementary doctrines implicated by attempted extortion undertaken by local and state governments or under color of law. By virtue of its unusual posture (in which the Court must take all of the Amended Complaint's allegations as true), it presents a remarkably pure scenario and thus a simple question: may a government (or, as in this case, a private person acting under color of state law) demand a cash payment as a condition of exercising or refraining from exercising its police power over landowners? The Court should capitalize on these circumstances to clarify what limits the Constitution places on demands for compensation by entities that otherwise have unlimited discretion in determining how (and whether) landowners may make use of their property.

CONCLUSION

For all the foregoing reasons, petitioners respectfully ask this honorable Court to grant the petition.

Respectfully submitted,

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APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED APRIL 5, 2006

BART DIDDEN, et al., Plaintiffs-Appellants, v. THE VILLAGE OF PORT CHESTER, et al., Defendants-Appellants.

No. 04-3485-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

173 Fed. Appx. 931; 2006 WL 898095

April 5, 2006, Decided

COUNSEL: For Plaintiffs-Appellants: RICHARD L. O'ROURKE, (Edward J. Phillips, of counsel), Keane & Beane P.C., White Plains, New York.

For Defendants-Appellees Napoli, Colangelo, Logan, DiRoberto, Crane, Ciccone, Sorenson, and the Board of Trustees for the Village of Port Chester: BRIAN J. STONE, (Mark S. Tulis, of counsel), Oxman, Tulis, Kirkpatrick, Whyatt & Geiger, LLP, White Plains, New York.

For Defendants-Appellees G&S Port Chester, LLC and Wasser: ALAN D. SCHEINKMAN, (William E. Dumke, of counsel), DelBello Donnellan Weingarten, Tartaglia Wise & Wiederkehr, LLP, White Plains, New York.

JUDGES: PRESENT: HON. SONIA SOTOMAYOR, HON. REENA RAGGI, HON. PETER W. HALL, Circuit Judges.

OPINION:

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be and it hereby is **AFFIRMED.**

Plaintiffs-Appellants appeal from a May 24, 2004 decision and order of the United States District Court for the Southern District of New York (Colleen McMahon, J.) dismissing their complaint alleging various constitutional violations under 42 U.S.C. § 1983 against the Village of Port Chester and others. We assume the parties' familiarity with the facts and procedural history in this case. We review the District Court's decision to grant a motion to dismiss a complaint pursuant to Fed.R.Civ.P. 12(b)(6) *de novo. Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 776 (2d Cir.2002).

In April 1998, Defendant-Appellee G & S Port Chester, LLC, ("G & S"), entered into a development agreement with Defendant-Appellee Village of Port Chester that named G & S as the designated developer of a marina redevelopment project. On July 14, 1999, after a public hearing, the Defendant-Appellee Village Board of Trustees adopted a resolution in which it made a finding of public purpose for condemnation of the properties located in the redevelopment district. In March 2003, Appellants discussed with representatives of a pharmacy chain the possibility of constructing a pharmacy on their property. A portion of Appellants' property adjoined the redevelopment district and another portion lay within the redevelopment district. According to Appellants, at a November 2003 negotiation session with Defendants-Appellees G & S and Wasser, Wasser demanded $800,000 from them in order to

avert a condemnation proceeding of their property within the redevelopment district, and offered to allow them to proceed if Defendants-Appellees were given a partnership interest in the project. Appellants refused both demands and, two days later, they received a petition seeking to condemn their property. On appeal, Appellants advance constitutional claims based on the Fifth and Fourteenth Amendments asserting, *inter alia,* that they have a right "not to have their property taken by the State through the power of eminent domain for a private use, regardless of whether just compensation is given."

The statute of limitations applicable to § 1983 claims in New York is three years. *Patterson v. County of Oneida,* 375 F.3d 206, 225 (2d Cir.2004). "While state law supplies the statute of limitations for claims under § 1983, federal law determines when a federal claim accrues." *Connolly v. McCall,* 254 F.3d 36, 41 (2d Cir.2001). Under federal law "a cause of action generally accrues 'when the plaintiff knows or has reason to know of the injury that is the basis of the action.'" *M.D. v. Southington Bd. of Educ.,* 334 F.3d 217, 221 (2d Cir.2003) (quoting *Leon v. Murphy,* 988 F.2d 303, 309 (2d Cir.1993)). Appellants had reason to know of the basis of their injury when the Board announced its public purpose finding on July 14, 1999. Appellants, however, brought suit in January 2004, more than three years after the date their claims accrued, and thus their claims are time-barred. We reject Appellants' contention that their injury actually accrued in November 2003 when G & S and Wasser "first utilized their *de facto* eminent domain power against [them] in an effort to exact a cash payment or partnership interest" in the pharmacy project.

Moreover, even if Appellants' claims were not time-barred, to the extent that they assert that the Takings

Clause prevents the State from condemning their property for a private use within a redevelopment district, regardless of whether they have been provided with just compensation, the recent Supreme Court decision in *Kelo v. City of New London,* 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), obliges us to conclude that they have articulated no basis upon which relief can be granted. *See id.* at 2668 ("Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project."); *see also Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp.,* 771 F.2d 44, 46 (2d Cir.1985). Finally, we agree with the district court that Appellees' voluntary attempts to resolve Appellants' demands was neither an unconstitutional exaction in the form of extortion nor an equal protection violation.

The district court properly dismissed the complaint on the ground that the Appellants' claims are time-barred. Accordingly, the judgment of the district court is hereby AFFIRMED.

APPENDIX B – DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 24, 2004

BART DIDDEN, DOMENICK BOLOGNA, FRED DeCESARE, CABERNET 119 REALTY CORP., OPUS 113 CORP., PAUILLACE 115 REALTY CORP., 117 NORTH MAIN STREET CORP., Plaintiffs,

– against –

THE VILLAGE OF PORT CHESTER, THE BOARD OF TRUSTEES for the VILLAGE OF PORT CHESTER, GERALD LOGAN, individually and in his official capacity as Village Trustee for the Village of Port Chester, DANIEL COLANGELO, JR., individually and in his official capacity as Village Trustee for the Village of Port Chester, JOHN M. CRANE, individually and in his official capacity as Village Trustee for the Village of Port Chester, GERARD DIROBERTO, individually and in his official capacity as Village Trustee for the Village of Port Chester, ANTHONY NAPOLI, individually and in his official capacity as Village Trustee for the Village of Port Chester, ROBERT SORENSEN, individually and in his official capacity as Village Trustee for the Village of Port Chester, G & S Port Chester, LLC. and Gregory Wasser, Defendants.

04 Civ. 0370 (CM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

322 F.Supp. 2d 385

May 25, 2004, Decided

COUNSEL: For Bart Didden, Domenick Bologna, Fred DeCesare, Cabernet 119 Realty Corp., Opus 113 Corp., Pauillac 115 Realty Corp., 117 North Main Street Corp., Plaintiffs: Richard L. O'Rourke, LEAD ATTORNEY, Edward J. Phillips, Keane and Beane P.C., White Plains, NY.

For the Village of Port Chester, Defendant: John Ernest Watkins, Jr., Law Office of John E. Watkins, White Plains, NY.

For The Board of Trustees for the Village of Port Chester, Gerald Logan, Peter J. Ciccone, Daniel Colangelo, Jr., John M. Crane, Gerard Diroberto, Anthony Napoli, Robert Sorensen, Defendants: Stuart Evan Kahan, Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP, White Plains, NY.

For G&S Port Chester, LLC, Gregory Wasser, Defendants: Alan David Scheinkman, DelBello Donnellan Weingarten Tartaglia Wise & Wiederkehr, L., White Plains, NY.

JUDGES: Colleen McMahon, U.S.D.J.

OPINION BY: Colleen McMahon

OPINION:

DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

McMahon, J.:

In this action, Defendants seek dismissal pursuant to *Federal Rule of Civil Procedure* 12(b)(6). For the following reasons, Defendants' motion is granted.

This case arises out of a dispute between private developers over a development project (the "Project") associated with the Village of Port Chester's ("Port Chester") redevelopment of twenty-seven acres of its downtown and waterfront areas. I will assume familiarity with the facts of this case, which are explained in detail in *Didden v. Vill. of Port Chester,* 304 F.Supp.2d 548 No. 04 Civ. 0370 (CM), 2004 WL 239718 (S.D.N.Y. Feb. 10, 2003) ("*Didden I*").

On January 16, 2004, Plaintiffs filed a complaint and an order to show cause with this Court, seeking temporary and preliminary injunctive relief that would stay the Condemnation Proceeding, as well as declaratory and monetary relief pursuant to 42 U.S.C. § 1983 against Port Chester and its Board of Trustees (the "Public Defendants") and Private Defendants. I denied Plaintiffs' motion for a preliminary injunction on *Younger* grounds, and because I found that Plaintiffs could not establish a likelihood of success on the merits. I granted Defendants leave to move for dismissal, which they did on February 6, 2004.

On March 3, 2004, Plaintiffs filed an Amended Complaint. The Amended Complaint contains two additional facts: first, that Plaintiffs own or control an assemblage of adjoining properties in Port Chester (the "Subject Properties") that are situated within an urban renewal district known as MUR Marina Redevelopment Project Urban Renewal District (the "MUR District") (Am.Compl.¶¶ 26,

29, 36); and second, that Plaintiffs additionally own or control four adjoining properties that are situated outside the MUR District (*Id.* ¶¶ 33, 37). More importantly, the Amended Complaint contains two additional substantive allegations. First, it alleges that Plaintiffs had no notice that, under New York Eminent Domain Procedure Law ("EDPL"), they had only thirty days to challenge in a judicial proceeding the July 14, 1999 findings by the Port Chester Board of Trustees (the "Board") that the condemnation had a public purpose (*Id.* ¶ 31). Second, it alleges that on February 23, 2004, the Village of Port Chester Planning Commission (the "Planning Commission") granted Plaintiffs final site plan approval to proceed with the Project; it had only granted preliminary approval before then (*Id.* ¶ 45). Finally, the Amended Complaint elaborates upon certain allegations made in the initial pleading, alleging that Defendant Wassler estimated that redevelopment of the Subject Properties as a retail pharmacy use would yield approximately $2,000,000 in profits for the developers who successfully completed such a project, and that he relied solely upon this estimate in formulating his demand that Plaintiffs buy him out for $800,000 (*Id.* ¶ 49).

After reviewing the parties' papers, I now dismiss Plaintiffs' complaint for the reasons discussed in *Didden I* and *Paul v. New York State Dep't of Motor Vehicles,* No. 02 Civ. 8839(AKH), 2003 WL 253065 (S.D.N.Y. Feb. 3, 2003) (Complaint dismissed because a state administrative proceeding was pending), as well as for the following reasons.

A. Standard for Motion to Dismiss.

Dismissal of a complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is proper only where "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Harris v. City of New York,* 186 F.3d 243, 247 (2d Cir.1999). The test is not whether a plaintiff is ultimately likely to prevail, but whether the claimant is entitled to offer evidence to support the claims. *Chance v. Armstrong,* 143 F.3d 698, 701 (2d Cir.1998). The factual allegations in the complaint are presumed to be true, and all reasonable inferences are drawn in the plaintiffs' favor. *EEOC v. Staten Island Sav. Bank,* 207 F.3d 144 (2d Cir.2000).

B. Statute of Limitations.

In *Didden I,* I held that all of Plaintiffs' claims, which assert that the Project lacks a public purpose or that the LADA improperly invoked Port Chester's eminent domain power relating to public purpose, are time-barred. Plaintiffs, in their Memorandum of Law in Opposition to Defendants' Motion to Dismiss, do not contest that the three-year statute of limitations governing general personal injury actions applies to 42 U.S.C. § 1983 claims brought within New York State. *Owens v. Okure,* 488 U.S. 235, 251, 102 L.Ed.2d 594, 109 S.Ct. 573 (1989); *Brandman v. N. Shore Guidance Ctr.,* 636 F.Supp. 877 (E.D.N.Y. 1986). They also do not contest that while state law provides the limitations period, the issue of when the federal cause of action accrued is a matter of federal law. *Fiesel v. Bd. of Educ. of N.Y.,* 675 F.2d 522, 524 (2d Cir.1982). As stated in my previous opinion, under federal law, a cause of action under § 1983 accrues when the plaintiff knows or has

reason to know of the injury that is the basis of the action. *Barrett v. U.S.*, 689 F.2d 324, 333 (2d Cir.1982), *cert. denied*, 462 U.S. 1131.

As I held in *Didden I*, the statute of limitations began to run on July 14, 1999, once Port Chester authorized a land disposition agreement with G & S, which covered the use of eminent domain incidental to the implementation of the redevelopment Project, and it was found that there was a legitimate public purpose for condemnation. *Didden*, 304 F.Supp.2d 548, 2004 WL 239718 at 16. Plaintiffs, however, assert that they did not suffer any injury until November 5, 2003, when G & S and Wasser allegedly attempted to exact a cash payment from them. Plaintiffs claim that they "could not have envisioned that the Private Defendants could engage in such conduct in March 1999." This argument does not save Plaintiffs' claim from being time-barred.

The March 30, 1999 letter from Plaintiffs to the Board shows that Plaintiffs were fully aware that a finding of public purpose would expose their property to the prospect of condemnation. They even expressed concern that the consequences of Port Chester entering into the LADA with the Private Defendants would mean that they would not have a "level playing field" from which to negotiate with G & S, and that G & S would have leverage because of its option to condemn the property of "those property owners with whom they are unable to finalize a deal." Consequently, Plaintiffs were able to, and did in fact, contemplate Port Chester's actions in 1999. This action was commenced on January 16, 2004, nearly five years after Plaintiffs sent their March 30, 1999 letter, and well over four years after Post [sic] Chester issued a public purpose finding and decided to

enter into a land disposition agreement with G & S. Therefore, I find that all of Plaintiffs' claims are time-barred.

C. Unconstitutional Exactions.

Plaintiffs also make a new argument, trying to analogize this case to a line of cases concerning public exactions. The law permits the government to put conditions on the grant of land use permits so long as the conditions have an essential nexus with legitimate public interests. *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987) (municipality conditioned permit to expand seaside home on public easement across property to reach public beaches); *see also Dolan v. City of Tigard,* 512 U.S. 374, 129 L.Ed.2d 304, 114 S.Ct. 2309 (1984) (municipality conditioned building permit on land owner's setting aside property for a storm drainage system and a public park). Plaintiffs claim that Defendants' threat to use their eminent domain power to condemn the Subject Properties unless Plaintiffs gave them either $800,000 or a partnership interest in the business on the property amounts to an unconstitutional exaction.

No exaction has occurred here. Plaintiffs have not had any conditions placed upon their property during their ownership that limit their ability to use their property. The exaction cases, therefore, have no relevance to the case at bar. There was a preexisting EDPL finding of "public purpose" under Article 2 that went unchallenged by Plaintiffs. It was not until November 2003 that Plaintiffs made any application for municipal land use approvals, and, when they did so, they knew that their property was subject to ongoing condemnation efforts. Since Plaintiffs concede that the July 1999 findings are unchallenged

and that their property was appropriately placed in the condemnation zone, the constitutional public purpose requirement has been met. Plaintiffs have no additional substantive rights other than to receive just compensation from Port Chester pursuant to Articles 3, 4, and 5 of the EDPL.

D. Plaintiffs Have Waived Their Right to Challenge the Public Purpose of the Redevelopment Project.

Plaintiffs allege that they "neither received nor had any notice" that the EDPL Section 207 afforded them only thirty days to bring a judicial challenge after the newspaper publication of the Board's July 14, 1999 findings. It is too late for Plaintiffs to challenge those findings now.

In prior litigation relating to this project, the Second Circuit has addressed this issue, but held that a condemnee can assert a procedural Due Process claim only when he has been "denied notice of the publication of the determination and findings and an opportunity to appeal." *Brody v. Village of Port Chester,* 345 F.3d 103, 113 (2d Cir.2003). Plaintiffs, however, do not claim that they lacked notice of the Article 2 findings; indeed, they concede that they received notice of the public hearing held on July 14, 1999. Nor do they contest that they had an opportunity to appeal. They simply allege that they had no knowledge of the thirty-day time limit to challenge the findings, and consequently they are not within the scope of *Brody.*

Furthermore, Plaintiffs are chargeable with the knowledge of rules and regulations duly adopted pursuant to and under the authority of law. *Flamm v. Ribicoff,* 203 F.Supp. 507 (S.D.N.Y. 1961). The Supreme Court has long

held that "[a]ll persons charged with knowledge of the provisions of statutes must take note of the procedure adopted by them." *N. Laramie Land Co. v. Hoffman,* 268 U.S. 276, 283, 69 L.Ed. 953, 45 S.Ct. 491 (1925). Plaintiffs were fully aware of the consequences of the condemnation findings, as their March 30, 1999 letter to the Board demonstrates. They also had notice of the public hearings that preceded the findings. Since Plaintiffs were on notice of the process and its consequences, they had an obligation to exercise due diligence to ascertain the status of the condemnation proceedings:

> It is well established that due process is not offended by requiring a person with actual timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right. *GAC Enters., Inc. v. Medaglia, (In re Medaglia)* 52 F.3d 451, 455 (2d Cir.1995).

Neither the federal nor state government is required to give individuals notice of the procedures affecting an individual's property rights. *City of W. Covina v. Perkins,* 525 U.S. 234, 243, 142 L.Ed.2d 636, 119 S.Ct. 678 (1999).

E. Extortionate Demand for Payment.

Plaintiffs claim that Defendant Wasser demanded that they pay him the sum of $800,000 or else he would cause Port Chester to condemn the Subject Properties and thereby divest Plaintiffs of title. However, their allegation of an extortionate demand of $800,000 to avoid condemnation adds nothing of legal significance to Plaintiffs' claims. As Plaintiffs themselves assert in their Complaint, G & S and Wasser have the authority under the LADA to obligate Port Chester to pursue condemnation of properties within

the Project's boundaries. (Scheinkman Aff., Ex. A, ¶ 62). Threats to enforce a party's legal rights are not actionable. *DiRose v. PK Mgmt. Corp.*, 691 F.2d 628, 633 (2d Cir.1982). Thus, even if Defendants did request payment in exchange for relinquishing the legal right to request condemnation, Plaintiffs have no recourse.

The EDPL does not require the condemner to negotiate with a private property owner in good faith prior to seeking to acquire title to the property. *Nat'l Fuel Gas Supply Corp. v. Town of Concord,* 299 A.D.2d 898, 752 N.Y.S.2d 187 (4th Dep't 2002). That Port Chester, G & S, and Wasser did meet with Plaintiffs and conveyed a proposal that Plaintiffs found unacceptable does not give Plaintiffs any substantive claims. Plaintiffs pursued their CVS site plan application and the CVS lease knowing that the Private Developers, under the LADA, might attempt to buy or condemn the disputed properties.

F. Unlawful Delegation.

Plaintiffs also allege that at some point during their course of dealing, the Public and Private Defendants dispensed with many of the LADA's provisions concerning Defendant G & S's obligations to provide notices to Port Chester and to fund certain escrow accounts timely. Assuming that this is true for the purposes of the motion to dismiss, Plaintiffs are not parties to the LADA and lack standing to assert any claims under the LADA.

For the reasons set forth above and in my earlier decision, Defendants' motion to dismiss is granted.

Dated: May 25, 2004

Colleen McMahon

U.S.D.J.

APPENDIX C – DECISION AND ORDER DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 10, 2004

BART DIDDEN, DOMENICK BOLOGNA, FRED DeCESARE, CABERNET 119 REALTY CORP., OPUS 113 CORP., PAUILLACE 115 REALTY CORP., 117 NORTH MAIN STREET CORP., Plaintiffs,

– against –

THE VILLAGE OF PORT CHESTER, THE BOARD OF TRUSTEES for the VILLAGE OF PORT CHESTER, GERALD LOGAN, individually and in his official capacity as Village Trustee for the Village of Port Chester, DANIEL COLANGELO, JR., individually and in his official capacity as Village Trustee for the Village of Port Chester, JOHN M. CRANE, individually and in his official capacity as Village Trustee for the Village of Port Chester, GERARD DIROBERTO, individually and in his official capacity as Village Trustee for the Village of Port Chester, ANTHONY NAPOLI, individually and in his official capacity as Village Trustee for the Village of Port Chester, ROBERT SORENSEN, individually and in his official capacity as Village Trustee for the Village of Port Chester, G & S Port Chester, LLC. and Gregory Wasser, Defendants.

04 Civ. 0370 (CM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

304 F. Supp. 2d 548

February 10, 2004, Decided

COUNSEL: For the Board Of Trustees for the Village of Port Chester, Defendant: Stuart Evan Kahan, Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP, White Plains, NY.

For 117 North Main Street Corp., Plaintiff: Richard L. O'Rourke, Keane and Beane P.C., White Plains, NY.

For 117 North Main Street Corp., Plaintiff: Edward J. Phillips, Keane and Beane P.C., White Plains, NY.

For G&S Port Chester, LLC., Defendant: Alan David Scheinkman, DelBello Donnellan Weingarten Tartaglia Wise & Wiederkehr, L., White Plains, NY.

For the Village of Port Chester, Defendant: John Ernest Watkins, Jr., Law Office of John E. Watkins, White Plains, NY.

JUDGES: McMahon, J.

OPINION BY: McMahon

OPINION:

DECISION AND ORDER DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

McMahon, J.:

In this action, Plaintiffs Bart Didden, Domenick Bologna, Fred DeCesare, Cabernet 119 Realty Corp., Opus 113 Corp., Pauillac 115 Realty Corp. and 117 North Main Street Corp. seek an order staying a condemnation proceeding in state court. For the following reasons, Plaintiffs' motion is denied.

BACKGROUND

This case arises out of a dispute between private developers over a development project associated with the Village of Port Chester's ("Port Chester") redevelopment of 27 acres of its downtown and waterfront area.

The Redevelopment Project

Port Chester had been seeking to redevelop its blighted waterfront and downtown areas since 1977 without success. In April 1998, Defendants G & S Port Chester, LLC. ("G & S"), and its principal, Defendant Gregory Wasser (together, the "Private Defendants") entered into a Land Acquisition and Disposition Agreement ("LADA") with Port Chester which named G & S as the designated developer of the Modified Marina Redevelopment Project (the "Redevelopment Project") in the urban renewal area of Port Chester known as the Marina Redevelopment Project Urban Renewal District (the "MUR District") in April 1998. The agreement called for development of approximately 500,000 square feet of modern retail establishments.

The Project was to be anchored by a Costco Wholesale warehouse store employing more than 150 people. The Project also includes a movie theater, a Marshall's department store, a Designer Shoe warehouse, a Bed, Bath & Beyond, a Michael's Arts & Crafts Store, as well as a Stop & Shop Supermarket. All of these stores are under construction today, employing dozens of union construction workers pursuant to agreements with several major contractors. Upon completion, the Project will offer jobs to more than 1,000 people, produce millions in tax revenues

to Port Chester and the State, and add over 2000 additional parking spaces to downtown Port Chester.

On July 14, 1999, following a public hearing, the Port Chester Board of Trustees (the "Board") adopted a resolution (the "1999 Findings") (1) making a Finding of public purpose for condemnation purposes under Article 2 of the New York State Eminent Domain Procedure Law and (2) approving the LADA and the designation of G & S as "the qualified and eligible redeveloper" for the Project (Affidavit of Greg Wasser ¶ 12 Exh. A.) The 1999 Findings stated that the Project "is designed to revitalize and beautify the Village's long neglected waterfront, eliminate a deteriorating downtown urban blighted area, bring sorely needed jobs to the Village, add to the Village's tax base, and importantly, bring the public back to the Village's downtown and waterfront." (Wasser Aff. ¶ 11 Exh. A.) Notice of the hearing was published pursuant to New York Eminent Domain Procedure Law (the "EDPL") § 202A, which requires the condemnor to publish notice of the hearing in newspapers at least 10, but not more than 30 days before the hearing. Although the EDPL does not require individual notice to the affected property holders, Defendants have attached a copy of the notice of public hearing and copies of signed receipts acknowledging that Plaintiffs received that notice. (Wasser Aff. ¶ 12 Exhs. D & E.) The EDPL allowed affected property owners 30 days after July 14, 1999 to appeal the Board's findings. EDPL § 207. Plaintiffs took no such appeal.

The Redevelopment Project became one of Westchester County's largest and most visible of such endeavors. It was the subject of substantial environmental review, public meetings and widespread publicity.

The Redevelopment Project called for the acquisition of thirty-eight separate properties and the relocation of more than one hundred individual families, most of whom were renting substandard or illegal apartments in deteriorated structures. Fifty-two businesses were also relocated. Lawsuits predictably ensued. G & S reached private settlements with most of the displaced business owners, landowners and residential tenants, and the Condemnation Part of the Supreme Court of Westchester County determined the remaining claims, some after trial.

Due to the Redevelopment Project's size, it has been undertaken in phases. G & S obtained building permits and proceeded with its first phase, which included Costco; it was completed in August 2002. At the same time, Defendants acquired land for subsequent phases and installed millions of dollars of public infrastructure improvements, including the construction of a waterfront park and new sea wall; new water, sanitary and storm sewers; new traffic controls, curbing and lighting and removal of old overhead utility lines.

While the first phase appears to have proceeded apace, the second phase of the Redevelopment Project was significantly delayed due to litigation initiated by various property owners and tenants. Although all cases were eventually decided in favor of Port Chester, the process took nearly two years. At the federal level, property owner William Brody, filed suit in this Court, alleging that the EDPL violated the Due Process Clause of the Fourteenth Amendment, both facially and as applied to him. In January 2001, the district court (Baer, J.) granted Brody's motion for a preliminary injunction, finding that defendants had failed to give Brody notice of the Findings of the Port Chester Board of Trustees or of his statutory right to

appeal the Board's Findings. The injunction halted large portions of the Redevelopment Project, at a significant cost to Defendants, until it was lifted by the Second Circuit on August 8, 2001. *See Brody v. Village of Port Chester,* 261 F.3d 288 (2d Cir.2001) ("*Brody I*"). Port Chester acquired title to Brody's property on August 28, 2001.

At the state court level, several owners challenged Port Chester's request for a writ of assistance pursuant to EDPL § 405(A), thereby preventing Port Chester from condemning their properties. Justice Peter Rosato of the Supreme Court of Westchester County granted Port Chester's writ in all cases. *See e.g., In Matter of Village of Port Chester, Greatest Estate Services of America, Inc.,* 00 No. 64481 (N.Y. Sup.Ct. Weschester Co. March 18, 2002) review of a state court judgment; *In Matter of Village of Port Chester v. Luis Perez, d/b/a Luis Luncheonette,* 00 No. 3793 (N.Y. Sup.Ct. Westchester Co. March 27, 2002); *In Matter of Village of Port Chester Fabio Sorto, d/b/a Rinconcito Salvadoreno,* 00 No. 3793, (N.Y. Sup.Ct. Westchester Co. March 18, 2002). Plaintiffs appealed Justice Rosato's decisions to the Appellate Division, and were granted stays pending appeal of those decisions to the New York Court of Appeals. The stays were entered on March 28, 2002.

Progress on the second phase began again when the stays were lifted after the Court of Appeals dismissed the final three motions for leave to appeal on July 1, 2003. *See In Matter of Village of Port Chester, Greatest Estate Services of America, Inc.,* 100 N.Y.2d 577, 796 N.E.2d 478, 764 N.Y.S.2d 386 (2003); *In Matter of Village of Port Chester v. Luis Perez, d/b/a Luis Luncheonette,* 100 N.Y.2d 577, 796 N.E.2d 478, 764 N.Y.S.2d 386 (2003); *In Matter of Village of Port Chester v. Fabio Sorto, d/b/a Rinconcito*

Salvadoreno, 100 N.Y.2d 577, 796 N.E.2d 478, 764 N.Y.S.2d 386 (2003). Port Chester finally had possession of all the parcels for the second phase by July 11, 2003. (Affidavit of John Watkins ¶ 24.)

Soon thereafter, Port Chester began preparation for phase three of the process, which included the area containing Plaintiffs' property.

In 2002, Private Defendants had publically announced their intention to locate Walgreens, a national drug store chain, in the area of the MUR District commonly referred to as "Retail E." The announcement came after Private Defendants failed to come to terms with CVS Pharmacy, following protected negotiations. (Wasser Aff. ¶ 30, *see below.*) In June 2003, G & S sought amendments to its approved site plan for the MUR District, including "Retail E," in order to accommodate the Walgreens store. (Didden Decl. ¶ 20.) Plaintiffs believed that the site plan was flawed, and planned to comment on the flaws at the next public hearing, scheduled for July 21, 2003. (*Id.* ¶ 21.) At the hearing, G & S announced that it was withdrawing the proposed amendments. (*Id.* ¶ 22.) Port Chester ordered and received updated title reports in August 2003, a map in October 2003, and a metes and bounds description in November 2003. (Watkins Aff. ¶¶ 26-30.) As soon as the metes and bonds description was finalized, Port Chester assembled a Petition to condemn Plaintiffs' property. (*Id* ¶ 31.) The condemnation proceeding was commenced on November 6, 2003.

The CVS Project

Plaintiffs are private developers who own or control various adjoining properties in Port Chester that are

situated in "Retail E" (the "Inside Properties"). In addition to the Inside Properties, Plaintiffs own or control four adjoining properties situated outside the MUR District (the "Outside Properties").

Since at least 1996, Plaintiffs have tried to redevelop both the Inside and Outside Properties as a CVS Pharmacy (the "CVS Project"). CVS showed little interest in the Project until Port Chester adopted the LADA agreement and designed G & S as the developer.

In late 2001, a CVS representative entered into negotiations with a G & S representative to discuss the possibility of locating a CVS entity in the "Retail E" area. (Declaration of Alfred Callegari ¶ 7.) The negotiations resulted in a proposal for development of a CVS store on "Retail E," which CVS ultimately rejected on May 8, 2002 because the size of the "Retail E" area was inadequate (*Id* ¶ 8.)

In March 2003, CVS approached Plaintiffs because the Inside Properties and Outside Properties, both owned by Plaintiffs, were, in combination, sufficiently large to accommodate CVS's spatial requirements. (Callegari Decl. ¶ 9; Declaration of Bart Didden, dated January 15, 2004 ¶ 25.) Plaintiffs secured various municipal approvals for the CVS Project and entered into a long-term lease of the Inside and Outside Properties with CVS. (Callegari Decl. ¶ 10.)

Plaintiffs entered into the CVS lease knowing full well that, under the LADA, the Private Defendants, as the designated developer of all sites within the MUR District (including the Inside Properties), "at some point, [] might attempt to buy or condemn [the Inside Properties]." (1/15/04 Didden Decl. ¶ 26.) As long ago as March 30,

1999, Plaintiffs had sent a letter to the Board (the "March 1999 Letter") stating that G & S's designation as "preferred developer" placed them at a competitive disadvantage in their negotiations with G & S, and asked that Port Chester remove the Inside Properties from the proposed project and site plan approval process. (Wasser Aff. Exh. C.)[1] The letter, which followed-up on comments made by Plaintiffs at a March 19, 1999 public hearing, is here reproduced in its entirety:

> Dear Madam Mayor and Board Members:
>
> We would like to thank the Board for its willingness to listen and take under advisement the public's numerous comments and suggestions regarding the revitalization of the marina district of our village.
>
> We would like to take this opportunity to review the comments of March 18 and formally restate our request for your thoughtful consideration. We have owned the property known as 103-105 North Main Street for six years. Dick has owned and maintained some of the adjacent buildings for more than fifteen years. Approximately three years ago, when CVS was endeavoring to construct a pharmacy in Byram and failed due to opposition by the local residents, we had contact with CVS. We were at that time willing to build to their specifications, but they informed us that they were "not interested in Port Chester."

[1] During the same month, William Brody also sought to exempt his property from the LADA because he wanted to develop it in light of market created by the Redevelopment Project. (Wasser Aff ¶ 27.)

We were willing to develop then. We are still willing to develop and are ready.

At this time, when G & S Investors is proposing a project for the downtown area, we find a synergy surrounding the project which is causing increased interest among many possible tenants, including CVS which formerly had no interest in Port Chester.

As you are aware, we have had a number of meetings in recent months, in the village with G & S and additionally with G & S and Peg/Park, the planners for G & S, in White Plains. These meetings have been promising, but they have borne no fruit. Hence, we find ourselves at a unique disadvantage. *We are anxious to develop our property, but by your actions, we are precluded because of the "preferred developer" status granted by you, the Board, upon G & S Investors with respect to "Retail E". We will continue to negotiate with G & S, but with the designation of "preferred developer", G & S enjoys the ultimate assistance of condemnation for those property owners with whom they are unable to finalize a deal.* (Emphasis added).

To our detriment, with their right to condemnation, G & S is not required or bound to ultimately negotiate in good faith. We have been discussing a proposed partnership whereby we would contribute all of the land necessary for the proposed building known as "Retail E". G & S would build the building and we assume, based on land value vs. construction costs and tenant acquisition, the percentages of ownership would be derived. This is a hypothetical formula and difficult to get agreement on. G & S, which we find open and cooperative to work with, has no urgency in finalizing a

deal with us. They are not required to finalize a deal of this or any nature. They, by a matter of right, may go directly to condemnation and proceed on their way.

We have believed in Port Chester for many years, as evidenced by our investments. Our investments are not limited to just this one site. Besides real estate, our respective primary operating businesses employ many local residents and provide needed services not only to businesses but residents, as well.

Our impression from speaking with various Board members and hearing your comments made at the public meetings, we realize that this project doesn't fully satisfy your individual wishes 100%. Agreed. But just as you do, we want to see a doable project proceed in the village.

Since "Retail E," located on our property, was not included in the original proposal, the removal of our property in no way would hamper the integrity or functionality of the future project. Furthermore, since we still desire to develop the property and would so in concert with the style of the G & S proposal, even if not a partnership with G & S, we request the following action of the Board of Trustees:

To remove the property know as 103-105 North Main Street and the immediately adjoining properties from the proposed project and site plan approval process so that from a level playing field we may negotiate with G & S to a possible partnership.

If a partnership with G & S is not attainable for whatever reason, we are agreeable to commit, in

a binding fashion, to construct a building in accordance with the G & S construction schedule on the site without delay after proceedings through the local approval process. Your fallback position is that at anytime it is deemed that we are not living up to our end of the agreement, you can always rededicate the preferred developer status on this property and move it forward or include the property in phase 2.

Please permit us the opportunity to maintain and fully realize our investment potential without seeking the injunction of the courts to protect our rights of ownership. We would like to explore the possibility of working with G & S and, ultimately, together with local financing and utilizing G & S, construct a building that compliments the entire project and have the ownership remain here in local hands. In our opinion, this course of action would be consistent with what is best for the village. Nobody wants to delay the progress of the village.

As you can see, we all share the same opinions. They may not be the best, but they are doable today.

Yours for a better village,

Domenick Bologna and Bart A. Didden.

In response to the letter, Port Chester declined to grant Plaintiffs' request for removal from the Redevelopment Plan, but urged the parties to convene a meeting to discuss the CVS Project.[2]

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[2] Plaintiffs argue that Port Chester should have exempted their properties because their development proposal of the "Retail E" area

(Continued on following page)

In fact, Plaintiffs and Private Defendants were already well acquainted. Plaintiffs participated in a public hearing convened by Defendants in March 1999. The March 1999 Letter also referred to "a number of meetings in recent months, in the village with G & S and additionally with G & S and Peg/Park, the planners for G & S, in White Plains." (Wasser Aff. Exh. C.) At their first meeting, G & S representative Gregg Wasser informed Plaintiffs that their properties were not part of the first phases of the development, but that before the Project reached their properties they would attempt to reach a fair settlement prior to initiating a condemnation proceeding. (Wasser Aff ¶¶ 24-25.) At another meeting, in 1999, the parties discussed the possibility of initiating a joint venture. (*Id.* ¶ 26.) Plaintiffs describe G & S's conduct at these meetings as "open and cooperative." (March 1999 Letter.)

At the July 21, 2003 public hearing, Plaintiffs voiced their concerns regarding G & S's proposed Walgreens site plan. Rather than engage in further public debate with Plaintiffs, G & S withdrew the amended site plan application and attempted, again, to negotiate with Plaintiffs directly. (Wasser Aff. ¶ 31.)

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was better than Private Defendants' proposal. Whether Plaintiffs are correct or not in their contention is irrelevant. Port Chester was only required to have a rational basis for its decision to take Plaintiffs' property and no more, *see* takings discussion *infra*. In fact, Port Chester disliked Plaintiffs proposal, as Plaintiffs acknowledge in the March 1999 Letter, because its would develop less property in the MUR zone than Private Defendants' plan. Plaintiffs' plan excludes from development Lot 11, a small centrally located vacant lot adjacent to Plaintiffs' properties. (Watkins Aff. ¶¶ 54-57.) The Redevelopment Project includes this lot. (*Id.* ¶ 58.) If Plaintiffs plan were to go forward, Lot 11 would remain undeveloped and isolated from any future development possibility.

At the behest of Port Chester officials, including the Mayor of Port Chester, the parties met again on November 5, 2003.

The parties do not agree on what happened during the meeting. Plaintiffs allege that Private Defendants demanded that Plaintiffs either pay them $800,000 or give them a partnership interest in the project or Private Defendants would cause Port Chester to commence a condemnation proceeding against the Inside Properties and thereby divest Plaintiffs of title. Private Defendants characterize the meeting differently. According to Gregg Wasser, the G & S representative present at the meeting, he and G & S's attorney informed Plaintiffs Didden and Bologna that it would be a waste of time for the lawyers to argue over who had "better" rights to proceed with their project. In lieu of continuing the "rights" debate, Wasser claims to have offered to conduct a joint venture with Plaintiffs on the Retail E property. After Plaintiffs rejected the offer, Wasser determined that the only other way to proceed would be to establish a value for the property and for one side to buy-out the other. Wasser estimated that the profit on the CVS store deal would be $2 million. He then stated to Plaintiffs that whoever would be responsible for completing the Project should be given some credit for the additional work and was entitled to more than a 50-50 split. Based on the $2 million profit figure, Wasser proposed a buy-out figure of $800,000, in addition to the fair market value of the property, to be divided among Plaintiffs Didden, Bologna and DeCesare. He said he would be just as happy being bought out by Plaintiffs at that figure as he would be to buy Plaintiffs out. (Wasser Aff. ¶ 32.) He also informed Plaintiffs that the condemnation process was continuing, and that, if they could not

reach an agreement, G & S expected that Port Chester would acquire the Inside Properties through condemnation.

On November 6, 2003, Port Chester commenced a condemnation proceeding against the Inside Properties in the Westchester County Supreme Court by filing a Notice of Petition and Petition (the "Condemnation Proceeding"). The petition seeks court permission authorizing Port Chester to file an acquisition map with the court and thereby gain title in fee to the Inside Properties pursuant to Article 4 of the EDPL. *See In the Matter of Village of Port Chester to Acquire Title To Certain Real Property Located In the Village of Port Chester, Westchester County, State of New York, and Designated on the Tax Maps of the Village of Port Chester as Section 2, Block 60, Lots 9, 10, 11, 12, 13, 14, 15, 16,* No. 18821/03 (N.Y. Sup.Ct. Westchester Co. filed November 6, 2003).

On November 24, 2003, the Port Chester Planning Commission held a public hearing on Plaintiffs' site plan application for the CVS Project, and granted preliminary site plan approval. (Declaration of Domenick Bologna, dated January 15, 2004 ¶¶ 21-22.) Following receipt of the site plan approval, Plaintiffs attended a meeting of the Board on December 1, 2003, in which they asked the Board to withdraw the pending Condemnation Proceeding. (1/15/04 Bologna Decl. ¶ 23.) On December 3, 2003, the Board held a special meeting to consider Plaintiffs' request. Although the request was denied, Port Chester allowed Plaintiffs additional time to respond to petition. (*Id.* ¶ 24.)

On December 17, 2003, Plaintiffs again petitioned Port Chester to amend the boundary line of the MUR

District to remove the Inside Properties from the district (the "Rezoning Petition"). (*Id.* ¶ 25.) On January 6, 2004, the Board held another special meeting, during which it announced, upon the advice of its special counsel, that it would not act on the Rezoning Petition. (*Id.* ¶ 27.) Instead, it agreed to convene a meeting with the Board's counsel, Plaintiffs and Private Defendants. This meeting occurred on January 12, 2004. (*Id.* ¶ 28.) Private Defendants reiterated their November 5 offer to Plaintiffs at the January 12, 2003 meeting. Plaintiffs did not accept.

The Instant Action

On January 16, 2004, Plaintiffs filed a complaint and an order to show cause with this Court, seeking temporary and preliminary injunctive relief that would stay the Condemnation Proceeding, as well as declaratory and monetary relief pursuant to 42 U.S.C. § 1983 against Port Chester and its Board of Trustees (the "Public Defendants") and Private Defendants. As a first claim for relief, the complaint alleges that Defendants are depriving Plaintiffs of their property without due process in violation of the Fourteenth Amendment. The second claim for relief alleges that Defendants have effected a taking of Plaintiffs' property in violation of the Takings Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment. The third claim for relief alleges that Defendants have abused their condemnation powers in violation of Plaintiffs' substantive due process rights under the Fourteenth Amendment. The fourth claim for relief alleges that Plaintiffs have been intentionally and unlawfully singled out and mistreated by Defendants in violation of the Equal Protection Clause. The fifth claim for relief seeks a

declaration that the development agreement (LADA) between Public Defendants and Private Defendants is unconstitutional because it unlawfully delegates Public Defendants' eminent domain power to the Private Defendants. The sixth and seventh claims for relief seek preliminary and permanent injunctive relief as well as attorney's fees.

The crux of Plaintiffs' argument is that the Public and Private Defendants have conspired to deprive Plaintiffs of the use of their property in order to pursue their own private interests – specifically, their development plans with Walgreens – rather than the interests of the public. Plaintiffs ask this Court to enjoin the Condemnation Proceedings.

The Defendants have asked me to abstain from deciding these issues, which they allege are properly before the state court in the Condemnation Proceeding. In lieu of such a ruling, Defendants ask that I deny Plaintiffs' request for a preliminary injunction on the merits.

Following oral arguments on January 16, 2004, I granted Plaintiffs' request for a 10-day temporary restraining order and ordered Plaintiffs to post a $1,000 bond, which they did. On January 23, 3004 [sic], after full briefing and oral arguments, I lifted the TRO and denied Plaintiffs' request to enter a preliminary injunction enjoining the condemnation proceeding. This opinion sets forth the reasons for that decision.

DISCUSSION

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), instructs

federal courts to resolve questions of Article III jurisdiction before reaching the merits of a plaintiff's claim. The doctrine of abstention, however, is equitable, not jurisdictional, in nature. *Schachter v. Whalen,* 581 F.2d 35, 36 n.1 (2d Cir.1978) (per curiam) ("*Younger* abstention goes to the exercise of equity jurisdiction, not to the jurisdiction of the federal district court as such to hear the case"). Therefore, I need not first reach the issue of abstention before deciding whether Plaintiffs are entitled to a preliminary injunction on the merits. *Id.,* at 36. Turning to that dispositive issue first, I find that they are not.

I. Preliminary Injunction

A. Standard of Review

In this Circuit, a preliminary injunction will be granted if the moving party shows that he will suffer irreparable harm absent injunctive relief and *either* (1) that he is likely to succeed on the merits of his claim; or (2) that there are sufficiently serious questions going to the merits to make them fair ground for litigation, and that the balance of hardships tips decidedly in favor of the moving party. *Wright v. Giuliani,* 230 F.3d 543, 547 (2d Cir.2000); *Fun-Damental Too, Ltd. v. Gemmy Industries Corp.,* 111 F.3d 993, 998-99 (2d Cir.1997). However, where the moving party seeks to enjoin government action taken in the public interest pursuant to a statutory scheme, that party must satisfy the more rigorous "likelihood of success on the merits" standard and may not resort to the lower "fair ground of litigation" test. *See Forest City Daly Hous., Inc. v. Town of N. Hempstead,* 175 F.3d 144, 149 (2d Cir.1999).

I deny Plaintiffs' motion for a preliminary injunction because I find that Plaintiffs cannot establish a likelihood of success on the merits, and that the balance of hardships favors Defendants.

B. Likelihood of Success on the Merits

Plaintiffs have not demonstrated that they are likely to succeed on the merits. Indeed, for the most part it is clear, not only that they are not likely to succeed, but that they cannot possibly succeed.

1. Statute of Limitations Bars Plaintiffs' Constitutional Claims

First, Plaintiffs claims are time-barred. Plaintiffs claims are premised on 42 U.S.C. § 1983. In New York, § 1983 claims are subject to the New York State's 3-year statute of limitations governing general personal injury actions. *Owens v. Okure,* 488 U.S. 235, 251, 102 L.Ed.2d 594, 109 S.Ct. 573 (1989). While state law provides the limitations period, the issue of when the federal cause of action accrued is a matter of federal law. *Fiesel v. Board of Ed. of City of New York,* 675 F.2d 522, 524 (2d Cir.1982). Under federal law, a cause of action under 42 U.S.C. § 1983 accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. *Barrett v. U.S.,* 689 F.2d 324, 333 (2d Cir.1982), *cert. denied,* 462 U.S. 1131, 77 L.Ed.2d 1366, 103 S.Ct. 3111.

Here, Plaintiffs had reason to know of the basis of their injury as soon as the Board announced its public purpose finding on July 14, 1999. On that date, Port Chester authorized a land disposition agreement with G & S which covered the use of eminent domain incidental to

the implementation of the Redevelopment Project. It found that there was a legitimate public purpose for condemnation as a means of acquiring property for the Project.

Plaintiffs now complain that no public purpose underlies the pending condemnation of their property, and that Port Chester unconstitutionally delegated its condemnation powers to G & S. But the March 30, 1999 letter from Plaintiffs to the Port Chester Board of Trustees, cited above, shows that Plaintiffs were fully aware that such a finding would, if not immediately overturned, expose them to the prospect of condemnation. Plaintiffs do not dispute receipt of the notice of public hearing submitted to the Court by Defendants. This action was commenced on January 16, 2004, nearly five years after Plaintiffs sent their March 30, 1999 letter, and well over four years after the Village issued a public purpose finding and decided to enter into a land disposition agreement with G & S. Therefore, I find that all of Plaintiffs' claims are time-barred.

2. Plaintiffs Were Accorded All the Process They Were Due

In addition, Plaintiffs have no likelihood of success on their due process claims. Procedural due process requires that the Condemnation Proceeding be fair and reasonable and that the government not act arbitrarily or unfairly interfere with Plaintiffs' property rights, *Daniels v. Williams,* 474 U.S. 327, 330, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986), while substantive due process restricts the power of the state from regulating in an arbitrary matter. *Natale v. Town of Ridgefield,* 170 F.3d 258, 263 (2d Cir.1999).

Plaintiffs have no claim under either theory. As to procedural due process, Defendants have complied fully and fairly with the EDPL. It was up to Plaintiffs to seek judicial review of Port Chester's Article 2 determination if they so desired. At this point, Plaintiffs remedy is limited to contesting the EDPL Article 4 Petition and making an Article 5 claim for just compensation. And, that is all the process that is due them. *Hellenic American Neighborhood Action Committee v. City of New York,* 101 F.3d 877, 880-881 (2nd Cir.1996). As to substantive due process, the EDPL has been held to meet all constitutional requirements. *See Frooks v. Town of Cortlandt,* 997 F.Supp. 438, 452 (S.D.N.Y. 1998), *aff'd,* 182 F.3d 899 (2d Cir.1999). Thus, Plaintiffs cannot succeed on their due process claims.

3. Plaintiffs' Takings Claim Cannot Succeed

Plaintiffs are not likely to prevail on their takings claim.

The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, precludes the taking of private property for *public use* without just compensation. *Dolan v. City of Tigard,* 512 U.S. 374, 383-84, 129 L.Ed.2d 304, 114 S.Ct. 2309 & n.5, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). Defendants contend that the Redevelopment Project (including the Inside Properties) serves a clear public purpose – the redevelopment of the blighted downtown area of Port Chester. This was specifically recognized by the Second Circuit – whose rulings I am hardly in a position to contravene – when it vacated the *Brody* injunction. *See Brody I,* 261 F.3d at 290-91. The alleged "bribe" by Private Defendants, even if it was a "bad

faith" offer, could not in any way have transformed that public purpose into a private purpose.

Insofar as Plaintiffs argue only that the taking of their property, not the overall Redevelopment Project, is not for a public use, Plaintiffs' arguments are also without merit. As this Court has previously held

> Once a legitimate public purpose for the overall project is conceded . . . the court cannot get involved in parsing the particular degree of public or private motivation behind the inclusion of a particular site in the Project area, so long as that inclusion could rationally be related to the public purpose of the plan as a whole.

Rosenthal & Rosenthal Inc. v. New York State Urban Development Corp., 605 F.Supp. 612 (S.D.N.Y. 1985), *aff'd*, 771 F.2d 44, 45 (2d Cir.1985). Plaintiffs have failed to adduce any evidence that the taking of their property was not rationally related to the purpose of the overall Redevelopment Project.[3] And, under *Berman v. Parker*, 348 U.S. 26, 35-36, 99 L.Ed. 27, 75 S.Ct. 98 (1954), I will not substitute this Court's judgment for that of the municipality as to where the appropriate boundary of the Redevelopment Project should be located.

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[3] Plaintiffs acknowledge that their CVS proposal did not fully satisfy the Board in their March 1999 letter (Wasser Aff. Exh. C). Unlike Plaintiffs' proposal, Private Defendants' proposal includes Lot 11, a vacant lot adjoining Plaintiffs' property that would otherwise be impossible to develop. Thus, it was certainly not *per se* irrational for Port Chester to refuse Plaintiffs request to remove the Inside Properties from the Redevelopment Plan.

Thus, I find that the Plaintiffs have no likelihood of success of showing that the condemnation of the Inside Properties does not serve a public purpose.

4. Plaintiffs Have Waived Their Right to Challenge the Public Purpose of the Redevelopment Project

Even if Plaintiffs could have made a showing of non-public use, it is too late for them to do so now. Port Chester issued its public purpose findings in July 1999. Under the EDPL, Plaintiffs and others were allowed thirty days to challenge the public purpose finding in state court. EDPL § 207. Plaintiffs failed to do so. Plaintiffs do not (and cannot) allege that they failed to receive notice of Port Chester's declaration of public purpose. To allow Plaintiffs to challenge the public purpose of the Redevelopment Project now would contradict the express provisions of the EDPL, and undermine New York's constitutional unitary scheme for the condemnation of property.

5. Rooker-Feldman Bars This Court From Revisiting the Public Purpose Finding

Under the *Rooker-Feldman* doctrine, a federal district court does not have jurisdiction to review a claim that has been previously decided by a prior state court proceeding. *D.C. Court of Appeals v. Feldman,* 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 416, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *Phifer v. City of New York,* 289 F.3d 49, 55-56 (2d Cir.2002).

Federal district courts lack subject matter jurisdiction "over cases that effectively seek review of judgments of

state courts." *Phifer,* 289 F.3d at 55. The only means by which a party may seek federal review of a state court judgment is by petitioning the Supreme Court for certiorari. *Id.* Moreover, issues that are directly decided or are "inextricably intertwined" with a state court decision are barred from federal review. *Feldman,* 460 U.S. at 486-87, 103 S.Ct. 1303. *Rooker-Feldman* extends to lower state court judgments. *Campbell v. Greisberger,* 80 F.3d 703, 707 (2d Cir.1996). Claims are "inextricably intertwined" when entertaining the second action would allow the party to "collaterally attack" the state court decision. The Second Circuit has stated that:

> the Supreme Court's use of "inextricably intertwined" means, at a minimum, that where a federal plaintiff had an opportunity to litigate a claim in a state proceeding (as either the plaintiff or defendant in that proceeding), subsequent litigation of the claim will be barred under the *Rooker-Feldman* doctrine if it would be barred under the principles of preclusion.

Moccio v. New York State Office of Court Admin., 95 F.3d 195, 199-200 (2d Cir.1996).

However, even if res judicata or collateral estoppel do not preclude the second suit, the *Rooker-Feldman* doctrine still may prevent maintenance of a federal action if "the litigant in federal court seeks relief that would effectively void or reverse a related state court ruling." *Wanderlust Pictures, Inc. v. Empire Entertainment Group,* 2001 U.S. Dist. LEXIS 10196, No. 01 CV 4465, 2001 WL 826095, at *3 (S.D.N.Y. July 19, 2001).

Under principles of collateral estoppel, Plaintiffs' takings claim will be barred if "(1) the issue in question

was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding." *Moccio,* 95 F.3d, at 200 (quoting *Colon v. Coughlin,* 58 F.3d 865, 869 (2d Cir.1995)). Both elements are present here. First, that the Redevelopment Project constituted a "public purpose" was actually and necessarily determined during the Article 2 phase of the Condemnation Proceedings in July 1999. Second, EDPL § 207 provided Plaintiffs with a full and fair opportunity to litigate the issue of public purpose in state court; indeed, under the EDPL, it was Plaintiffs' only provided forum for litigating the issue.

Additionally, the Article 2 "public purpose" determination was the predicate for numerous other individual judgments and court approved settlements previously reached between Port Chester and other lot owners in the MUR District pursuant to Article 4 in the Condemnation Proceeding. *See e.g., In Matter of Village of Port Chester, Greatest Estate Services of America, Inc.,* 00 No. 64481 (N.Y. Sup.Ct. Weschester Co. March 18, 2002); *In Matter of Village of Port Chester v. Luis Perez, d/b/a Luis Luncheonette,* 00 No. 3793 (N.Y. Sup.Ct. Westchester Co. March 27, 2002); *In Matter of Village of Port Chester v. Fabio Sorto, d/b/a Rinconcito Salvadoreno,* 00 No. 3793, (N.Y. Sup.Ct. Westchester Co. March 18, 2002). Each of these decisions, have been affirmed by the New York State Appellate Division with leave to appeal denied by the New York State Court of Appeals. *In Matter of Village of Port Chester, Greatest Estate Services of America, Inc.,* 303 A.D.2d 416, 755 N.Y.S.2d 862 (N.Y. App. Div. 2003); *In Matter of Village of Port Chester v. Luis Perez, d/b/a Luis Luncheonette,* 303 A.D.2d 416, 755 N.Y.S.2d 861 (N.Y. App.

Div. 2003); *In Matter of Village of Port Chester v. Fabio Sorto, d/b/a Rinconcito Salvadoreno,* 303 A.D.2d 416, 755 N.Y.S.2d 860 (N.Y. App. Div. 2003).

Were I to rule now that Private Defendants' actions had somehow transformed the public purpose of the Redevelopment Project into a private one, it would have the effect of undermining or voiding all of those prior state court rulings. This is precisely the situation that the *Rooker-Feldman* doctrine was intended to avoid. Thus, Plaintiffs' Takings Claim is also likely to be barred by *Rooker-Feldman*.

6. Plaintiffs' Equal Protection Claim Will Not Succeed

Plaintiffs are not likely to succeed on their Equal Protection claim.

To establish an Equal Protection violation, Plaintiffs must show that (1) compared with others similarly situated, they were selectively treated and (2) they were singled out for such disparate treatment as a result of a malicious or bad faith intent to injure them. *Crowley v. Courville,* 76 F.3d 47, 52-53 (2d Cir.1996).

Plaintiffs' property was a part of the EDPL Article 2 determination, which includes 37 other lots. Plaintiffs, like all other condemnees, had the chance to challenge the Article 2 determination. Like all others, they have the opportunity to contest Port Chester's Petition seeking an order and judgment permitting the filing of the acquisition map as to their parcel and the vesting of title in Port Chester under Article 4 of the EDPL. Like all other condemnees, Plaintiffs are entitled to be compensated under

Article 5 of the EDPL and can always make a claim within the time frame specified by the Supreme Court in the Notice of Acquisition. Finally, because Articles 3, 4 and 5 require resolution on a case-by-case/lot-by-lot basis, there is no requirement that all condemnees receive the same value for their property, so it is unlikely that Plaintiffs will be able to show disparate treatment based on the amount of compensation they receive for the Inside Properties.

7. No Unlawful Delegation

Plaintiffs are unlikely to succeed on their claim that the LADA is unconstitutional because it unlawfully delegates Public Defendants' eminent domain power to the Private Defendants.

Plaintiffs argue that the terms and conditions of the LADA are such that Port Chester has essentially handed-over its condemnation authority to G&S. If true, this would contravene the well-settled rule that a State cannot delegate its power of eminent domain to a private party. *See Contributors to Pennsylvania Hospital v. City of Philadelphia,* 245 U.S. 20, 23-24, 38 S. Ct. 35, 36, 62 L. Ed. 124 (1917) (citations omitted); *see also Kaufmann's Carousel, Inc. v. City of Syracuse Industrial Development Agency,* 301 A.D.2d 292, 750 N.Y.S.2d 212 (4th Dep't 2002), *leave to appeal denied,* 99 N.Y.2d 508, 757 N.Y.S.2d 819, 787 N.E.2d 1165 (2003).

But Plaintiffs have been aware of the terms of the LADA for quite some time. The LADA was adopted in 1999. EDPL created a mechanism for Plaintiffs to challenge LADA as being overly beneficial to Private Defendants at that time. Having made the determination not to challenge it then, they cannot now come to this Court to do

so now, when the Redevelopment Project has moved forward at great expense to both Public and Private Defendants.

C. Balance of the Equities

Even if there were serious questions going to the merits of Plaintiffs' federal claims-which there are not-the balance of the equities tips decidedly in favor of Defendants.

The Second Circuit has held that

> Whenever a request for a preliminary injunction implicates public interests a court should give some consideration to the balance of such interests in deciding whether a plaintiff's threatened irreparable injury and probability of success on the merits warrants injunctive relief. Otherwise a claim that appears meritorious at a preliminary stage but is ultimately determined to be unsuccessful will have precipitated court action that might needlessly have injured the public interest.

Brody I, 261 F.3d 288, 290 (2d Cir.2001) (quoting *Time Warner Cable v. Bloomberg, L.P.,* 118 F.3d 917, 929 (2d Cir.1997)). Here, as in *Brody I,* it is unquestionable that were I to enjoin the Condemnation Proceeding, Defendants and the public in general would suffer substantially greater harm than Plaintiffs would suffer if I were to allow the Condemnation Proceeding to proceed.

First, Defendants are already well on their way to completing the second phase of the Redevelopment Project, consisting of approximately 300,000 square feet of national credit retail. An injunction, and the resulting

delay caused by continuing litigation, would jeopardize all of the leases with the national tenants which Defendants would use to obtain credit to finance the construction of the next phase of the development. (Wasser Aff. ¶ 40.) Defendants assert without contradiction that loses [sic] from such delay could total in the tens of millions of dollars. (*Id.*) Second, Defendants have borrowed more than $120 million to date, which is partially secured by mortgages on the Redevelopment Project land. These loans are to be repaid out of the rent proceeds received from tenants upon the completion of the Project. These tenants include several major national retail establishments. The rent roll for the next phase of the Project, due to be completed in Fall 2004, exceeds $7 million per annum ($600,000 per month). (*Id.* P. 41.) A loss of even a few months rent therefore amounts to millions of dollars. Third, Port Chester is due to receive more than $1.5 million per year in new tax revenue from the Redevelopment Project. Further delay in the Project would therefore hamper Port Chester's ability to allocate this revenue to needed services. The last time the Redevelopment Project was halted by litigation, in 2002, it cost both Port Chester and G&S millions of dollars. There is no doubt that the same result would occur here if I were to grant Plaintiffs' request.

By contrast, it is unclear that Plaintiffs would suffer any harm were I to deny their request for an injunction. Plaintiffs argue that they will be harmed by the violation of their constitutional rights, the unlawful taking of their property and the loss of a unique investment opportunity. To the extent that Plaintiffs have allegedly suffered constitutional harms due to the nature of the Condemnation, the time for them to raise these issues was during the Article 2 proceeding. To the extent that Plaintiffs will

allegedly suffer monetary harm for the taking of their property and the loss of an investment opportunity, Plaintiffs can address those concerns in the Article 5 proceeding. They have a constitutional right to just compensation and there is no reason to believe that just compensation will not be paid.

As discussed above, the long history of this Redevelopment Project and the litigation surrounding it, as well of the course of dealing between the parties, indicate to me that this dispute is really nothing more than a local land use matter, which can and should be resolved by the state court. *Eddystone Equipment and Rental Corp. v. Redevelopment Authority of the County of Delaware*, 1988 U.S. Dist. LEXIS 4577 (1988 WL 52082, at *1, *aff'd*, 862 F.2d 307 (3d Cir.1988)) ("an injunction would require federal court involvement in local land use decision-making, a result never intended by Congress in enacting § 1983 . . . The essentially local character of this dispute and the availability of constitutional remedies in state court argue strongly against federal intervention, although the action is cast as a civil rights violation").

II. Abstention

Although I have denied Plaintiffs' preliminary injunction motion because Plaintiffs are unlikely to succeed on the merits, I note that *Younger* abstention also weighs in favor of denying Plaintiffs the remedy they seek.

A. Standard of Review

In *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the Supreme Court established the principle that federal courts generally should not enjoin or

interfere with ongoing state court proceedings. *Younger* held, specifically, that a federal court may not enjoin pending state court criminal proceedings absent bad faith, harassment or other unusual circumstances calling for equitable relief.

In *Middlesex County Ethics Committee v. Garden State Bar Ass'n,* 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982), the Court extended the reasoning of *Younger* to state administrative proceedings. *Middlesex* invoked a three-prong test for abstention in non-criminal proceedings: (1) whether the administrative proceedings constitute ongoing state judicial proceedings; (2) whether the state proceedings implicate important state interests; and (3) whether state procedures are available that allow the plaintiff to raise his federal claim in state court. *Middlesex,* 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982). An affirmative finding of all three factors compels a district court to abstain unless the state proceeding was commenced in bad faith or was filed for the purpose of harassing the plaintiff, or if other unusual circumstances warrant the court's intervention. *Middlesex,* 457 U.S. at 435, 102 S.Ct. at 2523.

A district court should not abstain "where a prosecution or proceeding has been brought to retaliate for or to deter constitutionally protected conduct, or where a prosecution or proceeding is otherwise brought in bad faith or for the purpose to harass." *Cullen v. Fliegner,* 18 F.3d 96, 103-04 (2d Cir.1994), *cert. denied sub nom.,* 513 U.S. 985, 115 S.Ct. 480, 130 L.Ed.2d 393 (1994). "In such cases, a showing of retaliatory or bad faith prosecution establishes irreparable injury for the purposes of the *Younger* doctrine, and the expectations for success of the party

bringing the action need not be relevant." *Id.* (citations omitted).

In this case, the state Condemnation Proceeding, which commenced on November 6, 2003, two months before this action was filed, is an ongoing state judicial proceedings. And the pending Condemnation Proceeding implicates important state interests. In fact, this Court has previously found that New York eminent domain proceedings always satisfy the first two prongs of *Younger*. *Broadway 41st Street Realty Corp. v. The New York State Urban Development Corp.*, 733 F.Supp. 735, 740-742 (S.D.N.Y.1990). Accordingly, Plaintiffs' only basis for federal intervention is that (1) they have not had an adequate opportunity to raise their federal claims in the Condemnation Proceeding; and/or (2) that the Condemnation Proceeding was commenced in bad faith.

B. Younger Abstention

1. Adequate Opportunity in State Court

A district court will abstain from exercising jurisdiction over a state action if the state action provides the plaintiff with an adequate opportunity to raise its constitutional claims. *Middlesex County*, 457 U.S. at 432, 102 S.Ct. at 2521.

Plaintiffs' argument hinges on whether the New York EDPL provides an adequate mechanism for addressing Plaintiffs federal constitutional claims. It does.

The purpose of the EDPL is to regulate the procedure for condemnation of private property. The EDPL sets forth a staged process for addressing the various issues that arise during a condemnation-each stage being the subject

of its own section (article) of the EDPL. However, as Judge Leisure recognized in *Broadway 41st Street Realty Corp.*, the five stages of EDPL constitute a single, unitary proceeding. *Broadway 41st Street Realty Corp.*, 733 F.Supp. at 743.

The Article 2 phase conclusively determines the need and location of a public project. Article 2 requires the condemnor of a property to conduct the public hearing upon public notice. EDPL §§ 202-203. Following the public hearing, the condemnor must issue a determination and findings, which must be published. EDPL § 204. Aggrieved persons may then seek judicial review in the Appellate Division by filing a petition within thirty (30) days after the completion and publication of the determination and finding. EDPL § 207.

The scope of review under EDPL § 207 includes whether (1) the proceeding was in conformity with the federal and state constitutions; (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority; (3) the condemnor's determination and findings were made in accordance with the statutory procedures; and (4) *and the public use, benefit or purpose will be served by the proposed acquisition.* EDPL § 207(c) (emphasis added). Later judicial review is precluded as to "any matter which was or could have been determined" by the Appellate Division, including a non-public use claim. EDPL § 208.

Article 3 of the EDPL controls the making of compensation offers for property that has been forced to be subject to condemnation for a public purpose. The preamble to Article 3 states that the public policy of New York favors

negotiated settlements. EDPL § 301. However, the condemnor

> fulfills[ ] the requirements of EDPL § 303 by making an offer to respondent property owners that 'it believes to represent just compensation for the real property to be acquired.' There is no requirement that petitioner 'plead or prove, as a prerequisite to the acquisition of property by eminent domain, that it negotiated in good faith with the [property] owner[s].'

National Fuel Gas Supply Corp. v. Town of Concord, 299 A.D.2d 898, 899, 752 N.Y.S.2d 187, 189 (3d Dep't. 2002); *Matter of County of Tompkins,* 237 A.D.2d 667, 669-70, 654 N.Y.S.2d 849, 851 (3d Dep't. 1997). "If a property owner believes that an offer is inadequate, the remedy is to commence an action in the Court of Claims pursuant to EDPL article 5." *Town of Concord,* 299 A.D.2d at 899, 752 N.Y.S.2d at 189.

Following an Article 2 determination and finding and an Article 3 negotiation or offer, the condemnor may commence proceedings to acquire the necessary property under Article 4. EDPL § 401. Article 4 proceedings are commenced when a petition is filed in the Supreme Court, served by registered or certified mail upon property owners and published. The petition must allege compliance with the provisions of Article 2; it need not allege compliance with Article 3. EDPL § 402; *see also Matter of Consolidated Edison Co. of New York, Inc.,* 143 A.D.2d 1012, 1013, 533 N.Y.S.2d 591, 592 (2d Dep't. 1988) (denying leave to amend answer under Article 4 because compliance with article 3 of the EDPL was not a constitutional prerequisite to the acquisition of the respondent's property pursuant to Article 4 of the EDPL). Property owners are

permitted to appear and interpose a verified answer, which must specifically deny each material allegation controverted by the owners, and which may allege "new matters constituting a defense to the proceeding." The Court may grant the petition upon "proof to its satisfaction" that the procedural requirements of the law have been met. EDPL § 402(b)(5). Thus, Article 4 effects the taking of the property. If, after title passes, the amount to be paid for the property remains in dispute, compensation is adjudicated in the Court of Claims pursuant to Article 5.

Plaintiffs argue that, because the Condemnation Proceeding is now at the Article 4 stage, and because Article 4 does not allow a state court to consider non-procedural issues, including constitutional claims, Plaintiffs were precluded from raising in state court their claim that their property is being taken for a non-public purpose.

That is true, but of no moment. Plaintiffs allege that Private Defendants have somehow commandeered the condemnation proceedings and subverted them for private rather than public benefit. But, Port Chester's findings and determination of July 14, 1999 under Article 2 stated that the Redevelopment Project constituted a "public use." (Wasser Aff. Exh. A.) Plaintiffs, who were in negotiation with CVS as long ago as 1996 (and whose letter of March 30, 1999 indicates a renewed interest in the area by CVS), could have appealed Port Chester's July 14, 1999 determination within 30 days as required by EDPL § 207. That was the moment to argue that the LADA unduly favored Defendants purely private interests. Indeed, because I am required to "view[] the state court condemnation proceedings as one unified judicial proceeding which fully provides plaintiffs with the opportunity to raise their federal constitutional claims, albeit at different stages in the

proceedings," *Broadway 41st St. Realty Corp.*, 733 F.Supp. at 743, I am constrained to conclude that Port Chester's "public use" determination under Article 2 is "part" of the ongoing Condemnation Proceedings, and that Plaintiffs had adequate opportunity to raise their concerns regarding the alleged "private use" of the Redevelopment Project in state court at the appropriate time in those proceedings. They chose not to do so. They cannot complain about it now.

Plaintiffs argue that Private Defendants showed their true color by attempting to coerce $800,000 from Plaintiffs as a condition of allowing them to develop the Inside Properties with CVS. They suggest that until the last few months they could not have known that the Private Defendants were acting for a private benefit-or more accurately, that they head turned from public benefit actors to private benefit actors. But the Private Defendants efforts to negotiate some sort of resolution with Plaintiffs that would accommodate both parties' economic interests does not retroactively transform the purpose of the Redevelopment Project (or any portion of it) from public to private. It merely recognizes that, as with so many things in life, whether something is fair or not is all a matter of money.

Brody v. Village of Port Chester, 345 F.3d 103 (2d Cir.2003) ("*Brody II*"), cited by Plaintiffs in support of their arguments, does not auger a contrary result. In *Brody II,* the Second Circuit considered an appeal on an action brought by property owner William Brody against Port Chester for failing to provide him notice of the public hearing regarding condemnation of his commercial property in connection with the same redevelopment project that is at issue in this case. The Court of Appeals found

that Brody had standing to assert his due process challenge in federal court because his constitutional claims could only have been raised in an Article 2 EDPL proceeding, not under Article 4, and the Article 2 phase was long since past. *Id.,* at 114-116. But, *Brody II* applies only where the property owner had no notice of the Article 2 findings, and therefore no opportunity to challenge them in a timely fashion. No such allegation has been made here. Indeed, as noted above, Defendants attach to their submissions a copy of the Public Notice for the July 14, 1999 public hearing that was sent to Plaintiffs along with signed return receipts acknowledging that Plaintiffs had received the Notice. (Wasser Aff. Exhs. D & E.) In their March 1999 Letter, Plaintiffs evidenced full awareness of what was going on in terms of the Redevelopment Project and the LADA. They even acknowledged that their properties were subject to condemnation. Thus, Plaintiffs clearly had the opportunity to raise their concerns about the "private" nature of the redevelopment within 30 days of the issuance of the "public use" finding-nearly five years ago.

Plaintiffs protest that they have no issue with the Redevelopment Project itself or with Port Chester's July 14, 1999 finding of public use. Rather, Plaintiffs argue that the problem is with the LADA because it "provides Private Defendants with an unlawful degree of control over the Village's exercise of eminent domain power" (Pl. Reply Brief at 11) and that, as a result, "the Condemnation Proceeding has been and continues to be used as a club by the Private Defendants in an effort to steal a piece of the CVS Project" (Pl. Reply Brief, at 14.) But, the time for Plaintiffs to object to LADA on the ground that it provided a private rather than a public benefit (the real thrust of

their argument) was during the Article 2 proceedings, of which they were given fair notice. That time has long since passed. Plaintiffs are barred from raising the issue.

Nor can Plaintiffs argue that the taking of the Inside Properties specifically is not within the ambit of the Redevelopment Project's public purpose. As discussed above, that claim is barred by *Rosenthal & Rosenthal Inc. v. New York State Urban Development Corp.*, 605 F.Supp. 612 (S.D.N.Y.1985), *aff'd*, 771 F.2d 44, 45 (2d Cir.1985). Having conceded, as they must, that the implementation of the Redevelopment Project was for a public purpose, Plaintiffs, in seeking federal intervention, are now limited to showing that the inclusion of the Inside Properties in the overall redevelopment scheme was not rationally related to the public purpose of the plan as a whole. No such showing has been made on the record before me.

Plaintiffs thus had adequate opportunity to raise their federal claims in state court.

2. Bad Faith

Plaintiffs next argue that I should intervene in the Condemnation Proceeding because it was brought in bad faith. *See Broadway*, 733 F.Supp. at 744 ("A federal district court should not abstain from interfering with state court proceedings if those proceedings have been brought in bad faith"). Plaintiffs allege that Private Defendants used the LADA to pressure Plaintiffs to pay them $800,000 in order to avoid the condemnation of their property, or alternatively, to gain a portion of the profits from Plaintiffs' CVS Project, and that Public Defendants initiated the Condemnation Proceeding solely in retaliation for Plaintiffs' refusal to pay the $800,000 to Private Defendants. Defendants

counter that the $800,000 figure was an estimate of what it believed, when combined with the fair market value of the Inside Properties, to represent a fair valuation of the total value of the Inside Properties, including Plaintiffs' expected profit from CVS Project. Private Defendants proposed that either side could buy-out the other for this amount.

The Second Circuit generally requires that a district court hold a full evidentiary hearing on factual disputes before making credibility findings on the issue of bad faith. *See Kern v. Clark,* 331 F.3d 9, 12 (2d Cir.2003). In *Kern,* however, the district court erred by failing to address the plaintiff's evidence that defendants "repeatedly and vigorously prosecuted weak cases against him at the behest of politically-connected complainants," which was precisely the basis of plaintiff's bad faith claim. *Id.* Here, however, the parties' factual disputes (which are really disputes about the meaning of certain words that everyone agrees were said) are immaterial to the question of bad faith. The bad faith argument is, therefore, inadequate as a matter of law.

Undermining Plaintiffs' suggestion of bad faith is the simple fact that Defendants had *no obligation whatsoever to negotiate,* in good faith or otherwise, with Plaintiffs. They merely had the obligation to offer Plaintiffs just compensation prior to acquiring title to their property pursuant to the EDPL. And, the offer is not the last word on the subject; determination of the adequacy of compensation is a matter that can be raised in state court during the Article 5 proceedings.

The same holds true for any claim that the Article 4 phase of condemnation, as to the Inside Properties, was

initiated in bad faith. Plaintiffs rely on *Gubitosi v. Kapica,* 895 F.Supp. 58 (S.D.N.Y.1995) and *Brooklyn Institute of Arts and Sciences v. City of New York,* 64 F.Supp.2d 184, 196 (E.D.N.Y.1999) ("*Brooklyn Institute*"). In *Gubitosi,* this Court found that allegations of bad faith were sufficient to avoid abstention where "the basic thrust of [plaintiff's] complaint is that the entire proceedings were initiated to retaliate against constitutionally protected conduct." *Gubitosi,* 895 F.Supp. at 62. In *Brooklyn Institute,* the court refused to abstain where it found that a state court action by New York City "was conceived and initiated as an instrument to pressure the Museum and to compel it to . . . remove specific objectionable works . . . and it is part of an ongoing effort to retaliate against and deter plaintiff's exercise of *First Amendment* rights." *Brooklyn Institute,* 64 F.Supp.2d at 196.

Here, as noted above, the Condemnation Proceeding is one unified judicial proceeding. It began at the Article 2 phase, back in July 1999. As a result of those Article 2 determinations, which cannot now be judicially challenged, Plaintiffs' property (and all other properties within the MUR District) has been found to be subject to condemnation for a public purpose. Plaintiffs have not suggested that the proceeding was commenced in bad faith at that time. Nor does the record support such a finding. Plaintiffs have had numerous opportunities to voice their concerns at public hearings and Defendants made repeated efforts to negotiate with Plaintiffs. It is clear that, even prior to the start of the Redevelopment Project, Defendants went out of their way to ensure that Plaintiffs' requests received a fair hearing.

Neither does the fact that, "For more than four years after the 1999 approval of the MMRP, G&S expressed no

interest and took no action with respect to the properties comprising Retail E" have any bearing on Port Chester's right to initiate a condemnation proceeding against Plaintiffs' properties. Even if true, this fact could not have led Plaintiffs to assume that the public purpose of the Redevelopment Project had been abandoned as to their properties. (1/15/04 Bologna Decl. ¶ 16; *see also* Declaration of Bart Didden, dated January 15, 2004 ¶ 26.) Plaintiffs should have known, as a matter of law, and did know, as a matter of fact, (1/15/04 Didden Decl. ¶ 26), that Defendants had the right to initiate the phase three proceeding at any point within 10 years of the commencement of the Condemnation Proceeding before it would be considered abandoned. *250 West 41st Street Realty Corp. v. New York State Urban Development Corp.*, 277 A.D.2d 47, 47-48, 715 N.Y.S.2d 407, 408 (1st Dep't. 2000), *leave to appeal denied,* 96 N.Y.2d 705, 746 N.E.2d 187, 723 N.Y.S.2d 132 (2001).

Plaintiffs' argument is disingenuous for still another reason. Until the summer of 2003, between the Brody injunction and the stay entered by the Appellate Division, the earlier stages of the Redevelopment Project were at a standstill. It is only in the last six or seven months that Defendants have been free to turn their attention to the next phase of the Project. That the next phase would involve Plaintiffs' properties was signaled by the Walgreens' announcement, which was made in 2002. And, the preparations to condemn the Inside Properties clearly began well before November 5, 2003. On this record, it is impossible to infer bad faith commencement of proceedings.

Finally, Plaintiffs argue that *Aaron v. Target Corp.*, 269 F.Supp.2d 1162 (E.D.Mo.2003) counsels against

abstention in this instance. Target Corp. involves facts that are similar, but not identical, to those facing me today. In *Target,* property owners brought an action under § 1983 against Target Corp., the City of St. Louis and the Land Clearance Redevelopment Authority of the City of St. Louis ("LCRA"), seeking to enjoin state condemnation proceedings on the allegation that their property was being taken for private rather than public use in violation of their constitutional rights under the *Fifth Amendment.* The district court found that abstention was not justified because the first and third prongs of *Younger* were not met. In addition, the court found that the bad faith exception applied based on the following:

> Plaintiffs have presented evidence that the state court condemnation action is not the product of a legitimate legislative or municipal finding of blight, but rather is the result of LCRA and the City allowing Target to usurp the municipal process and power necessary to find the Properties subject to condemnation, in order to take plaintiffs' Properties for Target's own private purpose. Plaintiffs presented evidence that (1) Target proposed a renegotiation of the Trust-Target Lease, but did not attempt to address the issue further after receiving Trust Plaintiffs' counterproposal; (2) Target told the City it might abandon the Properties because it had been unable to reach an agreement with plaintiffs as to a sale price, although no discussions ever took place between Target and plaintiffs concerning a possible sale of the Properties; (3) Target authored the Blighting Study, or at least the critical part of it finding that the Properties were blighted or insanitary; (4) without plaintiffs' knowledge, Target presented a redevelopment plan for the Properties, under which it would be

> the redeveloper; and (5) plaintiffs received no notice of the hearing before the Board of Aldermen on November 30, 2002, at which the Board considered declaring the Properties blighted, approving Target's proposed redevelopment plan, and authorizing LCRA to acquire the Properties through the exercise of eminent domain, because the City mailed notice of this hearing to Trust Plaintiffs "in care of Target" at its Minneapolis headquarters and Target apparently failed to forward the notice.

Target Corp., 269 F.Supp.2d, at 1172. Thus, *Target Corp.* involved a situation where the private entity surreptitiously manipulated a locality's eminent domain procedure from its inception solely to take ownership in the building it was leasing for the purpose of building a new Target store on the site. *Id.*, at 1165.

The same simply cannot be said about this case. Because local eminent domain procedures differ materially among jurisdictions, the Missouri court's decision in *Target Corp.* has limited precedential value for this Court's evaluation of Plaintiffs' bad faith claim under the EDPL. Nevertheless, even assuming for present purposes that *Target Corp.* were relevant, it is easily distinguishable. First, unlike in *Target Corp.*, the Redevelopment Project involves a huge redevelopment comprised of some 27 acres of Port Chester's downtown and waterfront, provides for the construction of over 500,000 square feet of retail space, and includes only about 0.5 acres of Plaintiffs' property (about 2% of the MUR District). (1/15/04 Bologna Decl. ¶¶ 11, 15.) Due to the substantial size of the Redevelopment Project, the development plan and the LADA have been well publicized, and were discussed at frequent public hearings prior to its adoption. Plaintiffs attended at

least some of those hearings, and have not contested that they at least knew about the July 1999 hearing, during which the public use determination was made. Second, unlike in *Target Corp.*, Defendants have tried on numerous occasions to negotiate with Plaintiffs. Lastly, unlike in *Target Corp.*, there is no evidence in the record of any threat or other coercive action by Private Defendants to abandon the Redevelopment Project if Port Chester refused to exercise its eminent domain power over Plaintiffs' property.

Because the Constitution bars only taking for a public purpose without just compensation, Defendants are obligated to do no more than pay a reasonable sum for the Inside Properties. Plaintiffs' allegations of bad faith in this matter are insufficient to warrant an evidentiary hearing or the granting of a preliminary injunction staying the state court proceedings. Plaintiffs therefore have no right to have their property exempted from the Project so that they can develop it privately.

For the foregoing reasons, I deny Plaintiffs' Motion for a Preliminary Injunction enjoining the prosecution of the EDPL Article 4 proceeding relating to Plaintiffs' Inside Properties in the New York State Supreme Court.

The Clerk of the Court is ordered to extinguish the bond.

Dated: February 10, 2004

APPENDIX D – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED AUGUST 9, 2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date:

Docket Number:	04-3485-cv
Short Title:	Didden v. The Village of Port Chester
DC Docket Number:	04-cv-370
DC:	SDNY (WHITE PLAINS)
DC Judge:	Honorable Colleen McMahon

(Filed Aug. 9, 2006)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 9th day of Aug. two thousand six.

Bart Didden, Domenick Bologna, Cabernet 119 Realty Corp., Opus 113 Corp., Pauillac 115 Realty Corp., 117 North Main Street Corp,

Plaintiff-Appellants,

Fred DeCesare,

Plaintiff,

v.

The Village of Port Chester, The Board of Trustees for the Village of Port Chester, Peter J. Ciccone, individually and

In his official capacity as Village Trustee for the Village of Port Chester, Daniel Colangelo Jr., Individually and In his official capacity as village Trustee for the Village of Port Chester, Gerald Logan, Individually and In his official capacity as Mayor of the Village of Port Chester, John M. Crane, Individually and In his official capacity as Village Trustee for the Village of Port Chester, Gerard Diroberto, Individually and In his official capacity as Village Trustee for the Village of Port Chester, Anthony Napoli, Individually and In his official capacity as Village Trustee for the Village of Port Chester, Robert Sorensen, Individually and In his official capacity as Village Trustee for the Village of Port Chester, G&S Port Chester, LLC., Gregory Wasser,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Bart Didden, Domenick Bologna, Cabernet 119 Realty Corp., Opus 113 Corp., Pauillac 115 Realty Corp., 117 North Main Street Corp. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie,
Clerk

By: /s/ [Illegible] Heller
Motion Staff Attorney

APPENDIX E - FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

U.S. CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. XIV, SECTION 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.